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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1701

JIM ROSE, WARDEN,
Petitioner,

vs.

JAMES E. MITCHELL and JAMES NICHOLS, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED MAY 27, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

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JIM ROSE, WARDEN,
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JAMES NICHOLS, JR.,
Respondents.

APPENDIX

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James Nichols, James Mitchell,
Defendants,

v.

State of Tennessee,
Respondent.

PLEA IN ABATEMENT

Motion for Dismissal of Indictments for Systematic Exclusion of Minority Groups From the Grand Jury Panel

Defendants, James Nichols, James Mitchell, Moves for Dismissal of the Indictments in This Matter as Being Illegal, Void and Unconstitutional on the Following Grounds.

1

The Array of the Grand Jury of Tipton County, Was Not Selected, Drawn or Summoned in Accordance With the Law and Is X Not Representative of the Community From Which It Was Impanelled Because of Systematic Exclusion of Negroe's, Other Minority's and People of Lower Income, Especially in Regards of the Position of the Forman, of Said Grand Jury.

2

The Grand Jury Was Without Sufficient Evidence Before It, Upon Wich to Hand Down the Present Indictment and Its Deliberations Were Characterized by Conduct and Remarks Reflecting Racial Hostility Against the Three Male Negro Defendants, Contrary to the Fifth and Six Amendments of the United States Constitution.

3

That the Unconstitutional Manner in Which Members of the Aforesaid Grand Jury Is Impanelled, and the Unconstitu-

tional Manner in Which Members of Said Grand Jury Are Carried Over From One Term to the Next, Completely Removes Its Independent Status as an Accusatory Body, and Reduces the Said Grand Jury to Nothing More Than an Extension of the Prosecutors Office to Rubber Stamp Any Indictment Presented to Said Grand Jury, as a True Bill Soley on the Whim and Carprice of a Member of the Tipton County Prosecutor's Office. That the Grand Jury is Selected and the Foreman Appointed Under an Illegal Keyman System.

4

Defendants Further Moves That a Convenient Date Before Trial Be Set for a Hering of This Notice Where Evidence May Be Presented and Arguments Made in Support of This Motion.

5

Defendants Further Moves That the Court Enter an Order Allowing Defendants to Subpoena, Without Cost, Witness to Appear on His Behalf at Such Hearings.

6

Defendants Futher Moves That the Clerk Be Directed to Supply Defense Counsel to Assist Defendants, Without Cost to Said Defendants, With Full and Complete Transcripts of the Proceedings of the Grand Jury.

7

The Foregoing Statements Are Based on Personal Observation and Inquiry of Those Who Have Serve on the Tipton County Grand Jury.

Respectfully submitted

/s/ James N. Nichols
/s/ James E. Mitchell

Sworn and Subscribed to or Before Me on This 1st Day of February, 1973.

/s/ David Field
Notary Public

My Commission Expires on the ... Day of ....., 1973.

(Filed Date: 2-8-73)

In the Circuit Court of Tipton County, Tennessee

State of Tennessee vs. James Nichols, Jr. and James Mitchell Defendants.	Nos. 846 and 847

BE IT REMEMBERED, that the above-entitled cause came on to be heard on this, the 13th day of March, 1973, at 9:30 a.m., in the above Court, before the Honorable Herman L. Reviere, Judge, presiding, when and where the following proceedings were had of record, to wit:

APPEARANCES:

GENERAL ABERNATHY, ESQ.,
and
GENERAL PARKS, ESQ.,
FOR THE STATE OF TENNESSEE

JOHN E. PROCTOR, ESQ.,
and
WILBUR F. CASH, ESQ.,
FOR THE DEFENDANTS

[3] **PROCEEDINGS**

THE COURT: Make a statement to the Court of just what the purpose is, and soforth.

MR. PROCTOR: If the Court please, there are two. Number 1 is a plea in abatement to the indictment. It's a motion for dismissal of indictments for a systematic exclusion of minority groups from the Jury panel. Then, there is a motion to suppress alleging certain evidence was procured by the State by reason of an illegal search. Then, last, the pre-trial motions to divulge any statements against the interest of the defendants or any matters of medical, scientific or nature or personal items that might be heard. Now, we didn't want to waive, actually waive. If the plea in abatement to the indictment was sustained, it would end the other motions.

THE COURT: Mr. Attorney General.

MR. PROCTOR: If the defense would be willing to take up the motion to suppress out of order, if we can do so without waiving the plea in abatement which should come first.

THE COURT: The Court would not let the defendant waive any of its rights, but—let me say this: The last motion, as well as I understand it, the question of demanding of the State any statements of evidence——

[4] GENERAL ABERNATHY: If Your Honor please, we won't have any trouble at all.

THE COURT: I understand there's no contest here. The State will provide you with any statements made by these defendants.

GENERAL ABERNATHY: Yes, sir. Later, we'd be glad to take it as item by item before Your Honor, but right now, we've got five or six Memphis policemen up here summoned by the defendant, and I'd like for them to be able to return to duty

as soon as possible. I'd like for the motion to suppress to be taken up first for that reason only.

THE COURT: All right, sir.

MR. PROCTOR: We don't object to that as long as we don't waive.

THE COURT: The Court will protect your rights, sir, and not waive any of your rights.

MR. PROCTOR: Thank you, sir.

MR. CASH: This is the matter of STATE OF TENNESSEE VERSUS JAMES M. NICHOLS, JR. and JAMES MITCHELL on two indictments; 847. This first one is a motion to suppress.

(Evidence Heard on Motion to Suppress)

(Witness excused.)

Mr. Cash: Your Honor, we're not going to call any of the other witnesses in connection with this motion to supress. However, we do want to go ahead with our motion—our Plea in Abatement. The motion about the Grand Jury. We'd like to call the three Grand Jury Commissioners at this time. Those are our next witnesses. We'd like to call the jury commissioners to find out how the jury panel was selected.

The Court: All right, Mr. Attorney General, what Mr. Cash has asked for it the calling of the jury commissioners on selection of the jury. I don't know how far this Court's going to go into this question, Mr. Cash. The Court can take judicial notice that this Court has sonsistently had black people on our juries. There are blacks on the jury at this term. There were blacks on the jury at the term of the indictment of these defendants. The Court does not recall of its own knowledge whether there were blacks on the Grand Jury that indicted. But, at least, since this Court has been on the Bench; in 1966, I believe it is,

there have been blacks serving on the jury for this Court and on the Grand Juries of this Court. The records—were they marked as blacks and whites—which the Federal Courts prohibit us from doing—would indicate this. This Court knows of its own knowledge, and I think the attorneys representing the defendants in this case know of their own knowledge— Maybe these defendants don't know this—but the Clerk can be put on; the jury commissioners can be put on, but there is no reason and the Court will allow you to put on some proof—but there's no reason to go into bringing every citizen in here to show this. This Court knows this and the Court makes this statement into the record, so that any reviewing Court will know this—that for many years, at least, certainly, during the time that these defendants were indicted, there have been blacks serving on the juries in large numbers and on the Grand Juries in this Court.

As I said, I'm not positive about the particular make-up of the Grand Jury but it could be very easily found out and put into the record what the Grand Jury make-up in this case was—in this particular case—and I think we should do that.

Mr. Cash: We'd like, also, to find out how these jury commissioners go about selecting the Grand Jury to insure that a proper number of blacks and other minority groups and these peoples' peers are in the panel.

The Court: All right, sir.

Mr. Cash: We'd like to call William Simonton.

Whereupon,

WILLIAM SIMONTON, JR.,

was called as a witness, and after having been first duly sworn, **[56]** was examined and testified as follows:

Direct Examination

BY MR. CASH:

Q. You're William C. Simonton?

A. Yes, sir.

Q. Jr.?

A. Yes, sir.

Q. Mr. Simonton, you're a citizen of Tipton County, Tennessee?

A. Yes, sir, indeed.

Q. And I ask you whether or not you have served as a jury commissioner of this county?

A. Yes, sir, I have.

Q. Can you tell me approximately how many years you've done so?

A. Approximately 10 years.

Q. In the makeup of the jury commission, or commissioners, do you have a chairman?

A. Yes, sir.

Q. I ask you who has acted as chairman—well, back to November, when you made up the jury panel, who was the acting chairman of the jury commissioners at that time?

A. I was.

[57] Q. Had you acted as such chairman before that time?

A. Yes, sir.

Q. Now, what I want to ask you, Mr. Simonton, did you act, also, as jury commissioner for this present term of Court, the March Term?

A. Yes, sir.

Q. Now, for the November Term of Court when the jury panel was selected, may I ask you how you obtained the names that we used to be drawn here by His Honor to act as jurors?

A. Well, the jury panel is kept in a locked metal box. Each name on a separate card. When we get through with one term, I lock the box, initial the seal and seal the box. When we get ready to draw the jurors the next time, I break the seal, un-

lock the box, we tumble the cards and then open the box and we have a child, I believe—I believe the requirement is that the child be less than 10 years old, and we have the child draw the names.

Q. Did you have a child draw these names at the November Term when you got ready?

A. Yes, sir.

Q. Now, I ask you: Where did you get those names that were in the box?

[58] A. The present jury list is made up from the telephone book.

Q. And who made that up? Did you and your commissioners?

A. The present commissioners have been serving for about 10 years. We made up that list.

Q. And you used the current telephone book at that time 10 years ago?

A. No. No. This present jury panel was selected about two years ago.

Q. Did you also select this by the use of the telephone book?

A. Two years ago is the first time we have used the telephone book. Prior to that we used the voter registration list.

Q. So, the November Term of Court then you did use a list that was made up from use of the telephone book?

A. Yes, sir.

Q. What listings or what telephone book did you use?

A. We used the telephone book furnished locally by South Central Bell, which includes Covington, Mason and Munford exchanges.

[59] Q. How can you insure from the use of the telephone book that you're getting a proportionate number of blacks to the overall population, for instance, of the community?

A. Well, we are aware of the need to show a proper racial balance. We have discretion. It's not just a case of going down the list and every five names, you pick. We use this only as a guide.

Q. Well, then, just how do you go about using this discretion? Tell the Court. We'd like to know exactly how that is determined, as far as you can tell us?

A. Well, we take the telephone book and we go down the list and we see the name of someone that we know, either in person or their reputation, to be of good character and we take that name and put it on the card.

Q. And how do you go about establishing this good reputation?

A. By reputation. Our commissioners are from three distinct areas of the county and, among the three of us, we're pretty well supposed to know, either personally or by reputation, people throughout the county.

Q. And do you make any effort to pick people by, say, income?

A. No.

[60] Q. Whether or not they're from the low income, so many from the medium income and so many from the high income groups?

A. The thought never crossed my mind, sir.

Q. What do you do to make sure that blacks are on there,—the number of blacks?

A. We are aware of the necessity of having a proper representation. If you could phrase the question a little bit more specifically, I could answer you a little bit more specifically.

Q. I'm merely asking you this, Mr. Simonton: How do you insure that you will have a proper proportionate or a proper ratio of black members on this jury panel? That's really my question.

A. Well, we seek out the names of black citizens who we know.

Q. Black citizens that you what?

A. Whom we know, either personally or by reputation.

Q. And you don't make any effort to pick any black members that you don't know or white members that you don't know?

A. Black or white, either; no, sir.

Q. So you depend on knowing these people, then; your knowledge of these people?

[61] A. Either personally, or by reputation; yes, sir. If it's just a name to us, we have to pass it up because we don't know them.

Q. So if you—I, more or less, ask you a hypothetical question —so if you know, say, 10 percent of the blacks and 90 percent of the whites then that would be the ratio that would be used on this panel; is that true?

A. If the percentages were valid; yes, sir, that would be the way that it would be chosen.

[62] Q. So you don't really make any effort to insure that you have a proper ratio then, or a mathematical ratio——

THE COURT: Mr. Cash, the Court knows of no requirement that there be a mathematical ratio. The Court believes the law to be that the jury commission shall select citizens whom they feel are qualified under the basis of the law of this State. They have copies of this law. I believe he's testified that they try to put people in there that they know or know their reputations. I think we ought to be more specific and ask him, rather than ratios, if they have numbers, or substantial numbers of blacks or not; whether they do or don't. There's no requirement that this Court knows of of any ratios, where they be black, or low income or high income, or whatever. It's just a

general picking of the population of this county in which this case is being tried.

MR. CASH: We except to the Court's ruling.

THE COURT: All right, sir. Let's proceed.

MR. CASH: I have no further questions.

MR. CASH: Do you know the population ratio of black and white in the county?

A. We have approximately 30 percent black population **[63]** in the county, the last figure I saw.

MR. CASH: Thank you.

THE COURT: Mr. Attorney General.

Cross-Examination

BY GENERAL ABERNATHY:

Q. Mr. Simonton, speaking of that 30 percent black population, would you know of your knowledge that just, maybe, a couple of years ago on the change of venue, a case transferred from Lauderdale County here, involving one Donald Brooks, who was charged with cutting a white woman's throat in Lauderdale County, would you know that on the trial of that case there were four members of the Negro race on that jury?

A. No, sir, I wouldn't be aware of that.

GENERAL ABERNATHY: That's all. Thank you.

THE COURT: Let me ask you a question or two, please, sir. Do you recall from your own knowledge as to whether you have, in putting the names in the box and then subsequently drawing them out, from your knowledge and your discussion with the other jury commissioners as to whether a sizeable number of blacks and those of low economic status have been on the jury panel?

THE WITNESS: Yes. We have been aware that there has been a sizeable number of blacks on each jury **[64]** panel. I must say that economic status does not enter into our consideration.

THE COURT: But let me ask you along these lines: Do you know a lot of people and, consequently, do you know that their status is both high and low economically?

THE WITNESS: Yes, sir.

THE COURT: Anything further from this witness?

Mr. CASH: No, sir.

(Witness excused.)

MR. CASH: Call William Bibb.

Whereupon,

WILLIAM BIBB,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. PROCTOR:

Q. Mr. Bibb, you're a member of the jury commission; a member of the three jury commissioners of Tipton County?

A. I am.

Q. How are the jury commissioners of Tipton County appointed?

A. By the Judge.

[65] Q. What Judge?

A. The Circuit Judge.

Q. To serve a definite term of office?

A. Four years.

Q. The jury that served back at the—that were indicted during the November 1972 Term, how was the Grand Jury selected for that time, that period?

A. Mr. Proctor, we're given a number of names by the Judge to be drawn—the number of names.

THE COURT: Excuse me, Mr. Proctor, you don't mean the Grand Jury.

MR. PROCTOR: Oh, excuse me. I mean the jury panel.

A. These jury panels. The jurors names are in a lock box and kept in a safe in the Clerk's Office. The Chairman opens the box and the jury commission is called. These names are called by a child who is under 10 years old, one by one, and they are selected in this manner.

Q. By what method—where does the jury commissioners get that list? I think they used to get it from the voters registration list, but have they departed from that practice? How were they obtained during the November 1972 Term of Court?

[66] A. They were selected from the telephone directories **[66]** of the county.

Q. There would be no way of determining a person's race—whether he was black or white, yellow, brown—by the telephone directory; would you?

A. Yes, sir. If you knew this person you would know; yes.

Q. You jury commissioners, at least one of you, would have a personal knowledge of the individual, either by personal acquaintance or by reputation and from the telephone directory?

A. Of those that we know, as far as it would be possible, in our particular area of the county.

Q. And if you don't know the man, either by personal acquaintance or by reputation, they are not picked?

A. They're not supposed to be unless we are pretty well aware of their reputation.

Q. Do you know whether or not—were there any colored members on the Grand Jury during November of 1972?

A. No, sir, I do not know. We do not select the Grand Jury.

Q. Would there be any way for the jury commission to know what proportion of blacks and whites would be on the jury panel in November of 1972?

[67] A. No, sir. Unless those that we know and as they were drawn out and taken in the order in which they were drawn.

MR. PROCTOR: I believe that's all.

GENERAL ABERNATHY: Thank you, sir.

(Witness excused.)

MR. CASH: Call W. D. Davis.

Whereupon,

W. F. DAVIS,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. CASH:

Q. Your name is W. D. Davis?

A. No, sir.

Q. What is it, then?

A. W. F. Davis.

Q. Where do you live, Mr. Davis?

Q. Where do you live, Mr. Davis?

A. Out about Charleston.

Q. What Civil District is that?

A. Fifteen.

Q. How long have you lived there?

A. All my life.

Q. Mr. Davis, I ask you if you are on the jury **[68]** commission of Tipton County, Tennnessee?

A. Yes, sir.

Q. How long have you been on it?

A. About 10 years, I imagine.

Q. You're been serving with Mr. William Bibb and with Mr. William Simonton?

A. That's right.

Q. Now I ask you: Were you serving as such, or just prior to, the November Term of Court of 1972?

A. Yes, sir.

Q. And did you and Mr. Bibb and Mr. Simonton actually choose a jury panel for that particular term or Court?

A. Yes, sir.

Q. Will you tell this Court exactly how you went about doing that?

A. Well, we—there's a girl—I imagine she's about six years old. She draws the names.

Q. Draws these names from where?

A. A box. A locked box. Mr. Simpson would lock it after each drawing and seal it and initial it and when we'd get ready to draw another one, he'd open it.

Q. What was done with this box after—Who safeguards it?

[69] A. The Clerk.

Q. The Clerk of the Court?

A. Yes, sir.

Q. Do you know where he keeps it?

A. He keeps it in a lock box.

Q. Is that a safe in his office?

A. Yes, sir.

Q. You say it has names in there; where did you get those names?

A. From the telephone directory of Tipton County,.

Q. How did you go about choosing the names from the telephone directory?

A. Well, we just went down the list and wrote them on the cards.

Q. Well, did you take every fifth one or tenth one, or what?

A. No. We just went down the list and the ones that we knew or knew of their reputation, we'd select them on that merit.

Q. Did you make an effort to see that a sizeable number of blacks was on the list?

A. Yes, sir.

Q. Did you make any effort to determine what **[70]** proportion of blacks you had?

A. Well, yes, sir, we tried to get proportions from the county.

Q. And you actually went about your selection in that procedure with a young six-year old girl making a selection out of the box?

A. That's right.

Q. Did you use this little girl, prior to the November Term of Court? Do you recall?

A. Well, I just can't remember exactly, but Mr. Simonton usually brought the girl along. He'd bring different ones. He'd get them off the street after school. We'd usually wait till after school. We'd have to wait till after school so we could find someone that age. I don't remember their names.

Q. Is any consideration given to their station in life, their economic status?

A. No, sir. We just went down the telephone book.

Q. You mostly go by what you think their reputation is?

A. Yes, sir. They're supposed to be of good character. That's my understanding.

Q. And that's just from your general knowledge?

[71] A. Yes, sir. And in talking to other people.

MR. CASH: That's all.

GENERAL ABERNATHY: No question. Thank you.

(Witness excused.)

Whereupon,

FRANK McBRIDE

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. CASH:

Q. You're Frank McBride, Sr.?

A. Yes, sir.

Q. Live here in Covington?

A. Yes, sir.

Q. You're a life-long resident of Tipton County, Tennessee?

A. Yes, sir.

Q. Mr. McBride, have you ever acted as foreman of the Grand Jury of Tipton County, Tennessee?

A. Yes, sir.

Q. Over how many years would you say you did?

A. Oh, ten or twelve years ago I was on for five or six years, I would say, and then about two or three times **[72]** since then, just for one session of Court.

Q. Have you ever known of any blacks acting as foreman of the Grand Jury?

A. Acting as Foreman?

Q. Yes, sir.

A. No, sir. I was always foreman when I was on the Grand Jury.

Q. Have you ever known of any foreman that was a black man?

A. No, sir.

Q. How were you selected as foreman? Who made that selection?

A. The Presiding Judge.

Q. And he's the one——

A. Well, it was back during Judge Walker's—Judge Walker was the first one that appointed me.

Q. Your function as foreman is to what—guide the proceedings of the Grand Jury?

A. That's right.

Q. Is it your job to get the witnesses in and out of the Courtroom or the Grand Jury Room?

A. (Nodded affirmatively.)

Q. And move proceedings along?

[73] A. That's right.

Q. To your own knowledge were you careful to—or were your Grand Jurors careful to weigh all the evidence pro and con that was presented to the Grand Jury?

A. As far as I know.

Q. And they were to find out if there was probable cause or was not probable cause?

A. (Nodded affirmatively.)

Q. Were there any colored on the Grand Jury on which you acted as foreman?

A. Yes, sir.

Q. That's been true at the last several times that you've acted as foreman?

A. Yes, sir.

Q. How many, as a rule, would you have on your Grand Jury—one, two, five, or what?

A. Oh, I think we've had as many as—usually, if I remember correctly, it's three or four.

Q. On your last Grand Jury that you were foreman of, how many did you have; do you recall?

A. I don't recall the exact number but, probably three or four.

Q. You just say "probably", because you don't [74] recall?

A. No, I really don't.

Q. You know there was, at least, some?

A. Yes, there was some.

MR. CASH: That's all.

GENERAL ABERNATHY: Thank you. No questions.

(Witness excused.)

MR. CASH: Call Peyton Smith.

Whereupon,

PEYTON J. SMITH

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. CASH:

Q. You're Peyton J. Smith?

A. Yes, sir.

Q. You're a resident of Tipton County, Tennessee?

A. Yes, sir.

Q. For how many years, Mr. Smith?

A. All my life.

Q. Mr. Smith, I ask you, have you performed the duty of foreman of the Grand Jury of Tipton County, Tennessee?

A. Yes, sir.

[75] Q. How many times?

A. Quite a few. I was foreman for several years back in the early '50's, and, because of health reasons, I had to resign and then I have served several times since then on occasion of the illness of the foreman at that time and actually having been summoned to serve on the jury and drawn again in the Grand Jury. I've had to serve then.

Q. When was the last time you served?

A. November Term of Court; '72.

Q. Have you known of any foreman that has been black?

A. No, sir.

Q. Did any blacks serve on the Grand Jury back in the November Term of Court, '72?

A. Yes, sir.

Q. How many?

A. One that I remember particularly. There might have been another, but I just happen to remember this one.

Q. Do you recall the name of the individual?

A. No, I don't recall the name.

Q. But you do recall that there was at least one black; there may have been two, you say?

A. It could have been another one; I don't remember **[76]** but I know this one in particular because I asked that person to serve on one of the committees to examine the County Penal Farm.

Q. Was this black a female or male?

A. Female.

Q. But you don't recall the name?

A. No, sir.

Q. How were you chosen at the November Term of Court? Who chose you to be foreman of the Grand Jury?

A. The foreman who had been serving on a permanent basis at that time could not be here and I was asked to come and appear before this Court and the judge asked me to serve.

Q. Who asked you to appear?

A. Mr. Naifeh, who was the foreman the Term before.

Q. You appeared before His Honor here?

A. Yes, sir.

Q. And His Honor commissioned you or appointed you as foreman of the Grand Jury for the November Term?

A. Yes, sir.

Q. Was that in writing or was that just oral?

A. Oral.

Q. You never received any commission or appointment in writing?

[77] A. No, sir.

Q. In your other times that you've served—When was the last time you served before the November Term of Court?

A. Well, as well as I remember, it was two years before and I served twice.

Q. Were there any blacks on those Grand Juries?

A. Yes, sir, there were several on there each time.

Q. But only on at the November Term?

A. Yes, sir.

MR. CASH: That's all.

THE COURT: Are there any questions from the State?

GENERAL ABERNATHY: Just one thing, if Your Honor, please.

Cross-Examination

BY GENERAL ABERNATHY:

Q. In paragraph II of the Defendants' Plea in Abatement this question is raised: that the Grand Jury's deliberations were characterized by conduct and remarks reflecting racial hostility against these three male Negro defendants, contrary to the Fifth and Sixth Amendments of the United States' Constitution. Now, Mr. Smith, that's the charge with reference to the Grand Jury of which you were the foreman, which returned the indictments against these men. Did anything like that happen in the jury room?

A. Not that I recall. I don't remember anything of that nature. We heard testimony of such witnesses as we called and there were no inflamatory or degrading remarks made at the time.

Q. Nothing done reflecting any racial hostility in that Grand Jury Room?

A. No, sir.

GENERAL ABERNATHY: That's all.

Redirect Examination

BY MR. CASH:

Q. Who furnished you with the list of the individuals to call as witnesses before the Grand Jury?

A. They were listed on the bill provided by the Attorney General.

Q. Were there any blacks on that list?

A. I don't recall. In fact, I don't think we called—I don't know whether we called all the witnesses or not. Sometimes we don't. We merely call the number of witnesses till such time as the Grand Jury is satisfied and ready to make a decision and they don't want to call any more.

Q. So you don't recall how many or if you called any blacks?

[79] A. No. It was quite a few bills we had that day and I'd have to look at the bills and the indictments and look at the names before I could tell you.

Q. Mr. Smith, are there any transcripts—Do you have a court reporter in the Grand Jury room?

A. No, sir.

Q. There is no transcript made of any of the testimony that's given by any of the witnesses?

A. No, sir.

Q. You simply question the witnesses that you feel, or that someone has furnished you, and then when you feel that there is enough evidence to show probable cause, then you——

A. (Interrupting) I usually questions the witnesses first to get basic information to the attention of the members of the Grand Jury and then I ask, after each witness has been examined, if there's anyone in the room that wants to ask any further questions of that witness. They are, each and every one, given an opportunity to question the witness.

Q. These proceedings are entirely oral and there's no written record of what transpires in there?

A. No written record, other than the names of the witnesses who appeared are entered into the Courts records.

Q. Then, on the indictments, if there are a number **[80]** of names that appear on there, it's not necessarily all those names?

A. Only the ones that appear.

Q. Only the ones that appear are on the indictment?

A. Only the ones that appear——

GENERAL PARKS: (Interrupting) If the Court please, I think we can eliminate all that. Here are the indictments (indicating); he's got a copy of them and they speak for themselves.

Q. (By Mr. Cash) What I'd like to find out: Did you call all

these persons; Preston Shankle, Charles Lavelle, Jack Blackwell, Robert Pickard, Bill Stimpson——

A. May I see the document?

THE COURT: I believe he's stated that they were all listed on there, but he didn't necessarily call them all.

MR. CASH: Well, at one time I get one impression——

THE WITNESS: I called one witness Charles Lavelle. If you'll look on here you can see that.

Q. (By Mr. Cash) He's the only witness you called out of that group of pepole that's listed on there?

A. Yes, sir.

[81] Q. That's all I wanted to find out.

A. The Grand Jury members were polled to see if they wanted to hear any other witnesses and they said they did not.

Q. You don't recall any other witnesses that were called for that particular indictment?

A. No, sir.

MR. CASH: Thank you.

(Witness excused.)

Whereupon,

JIMMY NAIFEH

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. PROCTOR:

Q. State your name, please.

A. Jimmy Naifeh.

Q. You haye been recently serving as foreman of the Grand Jury of Tipton County?

A. Yes, sir.

Q. How long have you so served?

A. Approximately two years.

Q. Have you ever known of a colored foreman of the Grand Jury of Tipton County?

[82] A. I haven't known if there was or if there wasn't.

Q. And you did not serve during the November 1972 Term of the Circuit Court. I believe Mr. Smith served?

A. That's correct.

Q. And you don't know who was on this particular Grand Jury?

A. No, sir.

Q. Have blacks served on the Grand Jury since you've been foreman?

A. Yes, sir.

Q. Could you give us some idea of what proportion of blacks to whites have served during this period?

A. There are usually two or three blacks.

Q. Have you known of any 18 to 21 year olds that have served?

A. No, sir. I can't say that any have or have not. We don't know their ages.

MR. PROCTOR: That's all.

GENERAL PARKS: No questions.

(Witness excused.)

Whereupon,

MRS. HAROLD BILLINGS

was called as a witness, and after having been first duly **[83]** sworn, was examined and testified as follows:

Direct Examination

BY MR. PROCTOR:

Q. Mrs. Billings, did you serve on the Grand Jury of Tipton County at the November 1972 Term of the Circuit Court?

A. I did.

Q. Do you recall whether or not there were any blacks on the jury?

A. On the Grand Jury or in the room?

Q. On the Grand Jury.

A. Mrs. Buford served with us. She's sitting back there (indicating).

Q. Were there any others?

A. No, sir, we were drawn out of a hat and that's the way it landed.

Q. Do you recall there being more than one witness that appeared before the Grand Jury in connection with the murder case in which James Nichols, Jr. and James Mitchell were charged during that session?

A. November was a long time ago, but, as far as I know, Lavelle—Sherriff Lavelle was the only witness that we heard on that.

Q. During the course of the conversation concerning these **[84]** parties was there any discussion or anybody—did anybody vioce any discrimination against them because of their race or color?

A. No, sir; definitely not.

MR. PROCTOR: That's all. Thank you.

Cross Examination

BY GENERAL PARKS:

Q. Let me ask you this, Mrs. Billings: Were your deliberations on that day in reference to investigating this case we're talking about characterized by conduct and remarks reflecting racial hostilities against the three male Negro defendants?

A. No, sir. Frankly, we were all scared to death and the questions we asked were quite serious and we were all serious-minded about it all. There was no comments of any form.

Redirect Examination

BY MR. CASH:

Q. You just made the comment that you were all scared to death. Who were you afraid of and why were you afraid?

A. I didn't mean it that way, but we were serious about it. I think for all of us it was the first time to be on any type of jury duty.

[85] Q. You're not implying then that you acted out of fear?

A. No, we were not intimidated. We were serious about it. It was just kind of an expression.

MR. CASH: I just wanted to clarify that, Mr. Billings. That's all.

(Witness excused.)

MR. PROCTOR: Call W. B. Davis.

THE SHERIFF: Mr. W. B. Davis is in Florida. I'm not sure when he'll be back.

MR. PROCTOR: Marvin E. Gay.

Whereupon,

MARVIN E. GAY,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. CASH:

Q. Your name is Marvin E. Gay?

A. Yes, sir.

Q. Mr. Gay, did you serve on the Grand Jury back at the November Term of Court, 1972?

A. Yes, sir.

Q. And at the time did you and the others consider **[86]** the indictments against two individuals here, Nichols and Mitchell?

A. Yes, sir.

Q. How many blacks served on that Grand Jury with you?

A. One.

Q. Was that Mary Ann Buford?

A. Yes, sir, I believe that's her name. She's sitting right there (indicating).

Q. How many witnesses were called to appear before your group?

A. One, as I know of; Mr. Charles Lavelle.

Q. You don't recall any others?

A. No, sir.

Q. I ask you: What was the general attitude of the Grand Jurors relative to the fact that these two, indicted here, were black?

A. Would you repeat that?

Q. Did the fact that these two defendants here were black—did that enter into the discussion of have anything to do with the indictment?

A. No, sir. Not at all.

Q. You didn't note any hostility because of race?

A. No, sir.

[87] MR. CASH: No further questions.

GENERAL PARKS: No questions.

(Witness excused.)

MR. PROCTOR: Call Richard C. Morrison.

Whereupon,

RICHARD C. MORRISON,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. PROCTOR:

Q. Your name is Richard C. Morrison?

A. Yes, sir.

Q. You were a member of the Grand Jury that served for the Circuit Court of Tipton County, Tennessee, at Covington during the November 1972 Term of Court?

A. Yes.

Q. Were there any blacks that served with you on this jury?

A. There was one.

Q. Do you recall her name?

A. Mary Ann Buford.

Q. Were there more than one witness that testified in connection with the indictments where the two blacks, James **[88]** Nichols, Jr. and James Mitchell, at that time for the alleged murders?

A. No, sir.

Q. During that time was there any hostility expressed towards these defendants because they were blacks?

A. No, sir.

MR. PROCTOR: I believe that's all.

GENERAL PARKS: No questions.

(Witness excused.)

MR. CASH: Call Henry L. Peel.

Whereupon,

HENRY L. PEEL,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

THE COURT: Mr. Cash, I think we could save a little time by agreeing that there was only one black that served on this Grand Jury.

MR. CASH: All right.

Direct Examination

BY MR. CASH:

Q. You are Henry L. Peel, better kown as Lonzo Peel?

A. Right.

[89] Q. Mr. Peel, were you on this Grand Jury back at the November Term 1972?

A. Yes, sir.

Q. Did you note any hostility expressed or indicated in any way relative to these two blacks that were indicted on a murder charge at that time?

A. No, sir, I did not.

Q. You didn't note any at all?

A. No, sir.

Q. And your deliberations were strictly on the evidence presented by the witnesses that appeared in the Courtroom?

A. Yes, sir.

MR. CASH: That's all.

(Witness excused.)

MR. PROCTOR: Call Mary Ann Buford.

Whereupon,

MARY ANN BUFORD,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. CASH:

Q. You're Mary Ann Buford?

[90] A. That's right.

Q. Is it Mrs. Buford?

A. Miss.

Q. Miss?

A. Yes, sir.

Q. Miss Buford, you did serve on this Grand Jury back in November Term of Court, 1972?

A. Yes, sir, I did.

Q. I believe it's been established you were the only black. Do you recall that you were?

A. Yes, sir.

Q. Now, Miss Buford, I ask you: You are a member of the same race as these two individuals. Was there hostility denoted in any way relative to the indictments of these two individuals?

A. No, sir, no color or race was even discussed in the case at all.

Q. You didn't detect any kind of prejudice?

A. No, sir.

Q. Being a black, you would be sensitive to that type of prejudice, if there were anything?

A. I guess so.

Q. You didn't detect any?

[91] A. No, sir.

Q. None whatsoever?

A. None whatsoever.

Q. You're sure about that?

A. I'm positive.

MR. CASH: That's all.

(Witness excused.)

MR. PROCTOR: I wonder if we could examine these other six collectively?

THE COURT: Let the others come around.

MR. PROCTOR: Mrs. O. V. Zenar, Nancy E. Ward, Billy Wooten, Mrs. W. B. Reeves and J. C. Thornton, Jr.
Whereupon,

MRS. O. V. ZENAR, NANCY E. WARD, BILLY WOOTEN, MRS. W. B. REEVES, J. C. THORNTON, JR.
were called as witnesses, and after having been first duly sworn, were examined collectively and testified as follows:

Direct Examination

BY MR. CASH:

Q. I'm going to ask you collectively, all of you did serve on the Grand Jury at the November Term of Court 1972?

A. (Each witness nodded affirmatively.)

Q. And you served on there and you were a part of the [92] Grand Jury Panel that indicted James Mitchell and James Nichols, Jr. on first degree murder.

A. (Each witness nodded affirmatively.)

Q. Did you note any prejudice toward them or any others involved in this relative to their color or their being black?

A. (Each witness nodded negatively.)

Q. You all say that you denoted no racial hostility, either expressed or implied, or any undertones of it?

A. (Each witness nodded negatively.)

Q. Was there any consideration at all in the indictments that they were black?

A. (By Witness Thornton) I think we were there for the consideration of the indictments and not the color. That wasn't brought up.

Q. You didn't know whether they were blacks or not?

A. (By Witness Thornton) I didn't.

THE COURT: Did any of you know that they were blacks?

A. (Each witness nodded negatively.)

WITNESS THORNTON: It wasn't specified.

THE COURT: Anything further?

[93] MR. CASH: Nothing further.

THE COURT: Thank you, lady and gentlemen, for being here today.

(Witnesses excused.)

THE COURT: Any further witnesses? Do you have any further matters you'd like to present, Mr. Proctor and Mr. Cash?

MR. CASH: None, to my knowledge.

THE COURT: Do you want to make any statements?

MR. CASH: We have these pre-trial motions that have been filed in this case, Your Honor. Should they be read at this time or does Your Honor want to go over them and read them?

GENERAL ABERNATHY: If Your Honor please, I believe right here, and in open Court, we can agree on most of these things.

THE COURT: Why don't we just go down them, kind of numerically, on these things.

GENERAL ABERNATHY: Is Your Honor ruling first on the Plea in Abatement? If Your Honor please, I would like to put one witness on for the State.

THE COURT: All right.

[94] Whereupon,

H. M. PATRICK,

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

BY GENERAL ABERNATHY:

Q. Mr. Patrick, you are the Circuit Court Clerk of Tipton County, and have been for how long?

A. About two and a half years.

Q. Mr. Patrick, the question has been raised about the systematic exclusion of members of the Negro race from jury duty in Tipton County. I have just one or two questions I want to ask you about that.

Do you recall the occasion, approximately two years ago, when a case wherein Donald Brooks, a member of the Negro race, had been indicted in Lauderdale County for the throat-cutting murder of a prominent white lady?

A. I do.

Q. And the case was transferred on application for change of venue by the defendant to Tipton County for trial? Do you recall that?

A. Yes, sir; I do, sir.

[95] Q. Do you recall that, upon the final selection of the 12 jurors who sat on that case, four of them were members of the Negro race?

A. I do, sir. I can name the names, if you'd like for me to.

Q. What do you personally know, Mr. Patrick—what's the average—or could you give us any idea about the average ratio of blacks to whites, whites to blacks, that occurs on practically ever panel that is selected for jury service here every four months?

A. With the ones that's drawn in my office?

Q. And what you've had an opportunity to observe here in the Courtroom?

A. Well, it's a good percentage of blacks to the whites. Now, I wouldn't want to——

Q. (Interrupting) Not a mathematical ratio, but has there been a very substantial number of members of the Negro race serving on Grand Juries and Trial Juries in Tipton County since you've been Clerk?

A. Every Court, sir.

Q. How long have you been Clerk, sir?

A. Since 1970.

GENERAL ABERNATHY: Thank you. That's all.

[96] THE COURT: Any questions?

MR. PROCTOR: No, sir.

(Witness excused.)

THE COURT: All right, sir. On the motion to suppress, the motion will be denied. Plea in Abatement will be denied.

STATE OF TENNESSEE

VS. No. 846

JESSEE FORD, JAMES NICHOLS, JR.
JAMES MITCHELL, THEODORE ROGERS

Motion to suppress is denied and plea in abatement is overruled. Court permits State to amend list of witnesses to be subpoenaed the names of L. M. Rose and Dan Jones of the Shelby County Sheriff's Department.

Thereupon, Court adjourned until March 19, 1973.

/s/ Herman L. Reviere
JUDGE

In the Court of Criminal Appeals of Tennessee
Jackson, March, 1974

James Nichols, Jr. and James Mitchell, Plaintiffs-in-Error, v. State of Tennessee, Defendant-in-Error.	No. 1 Tipton County Hon. Herman L. Reviere, Judge (First Degree Murder)

For the Plaintiffs-in-Error: Wilbur F. Cash and John E. Proctor, Covington, Tennessee

For the Defendant-in-Error: David M. Pack, Attorney General; Weldon B. White, Jr., Assistant Attorney General;

Will Terry Abernathy, District Attorney General; Preston Parks, Assistant District Attorney General

Opinion Filed: June 5, 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

OPINION

James Nichols, Jr., and James Mitchell, the plaintiffs-in-error, were jointly indicted in two separate indictments for the murder in the first degree of William Nabors and Claudie Greer. Plaintiffs-in-error were tried, found guilty of murder in the first degree, and sentenced to consecutive sentences of sixty years in the penitentiary in each case.

The murders arose out of the armed robbery by Nichols and Mitchell of a cafe in Tipton County. The lengthy record reflects that Nichols, with a pistol in each hand, informed the proprietor that it was a stickup and forced him to hand over the cash register receipts of about five or six hundred dollars. Nichols also took money from the person of the proprietor and others, fired several shots into the back room, and fled.

Simultaneously Mitchell, armed with a sawed-off shotgun, was in the back room of the cafe robbing some patrons who were engaged in a dice game. One of those gambling was William Nabors, who was shot in the mouth by Mitchell when Nabors bent over to pick up some change on the floor. Mitchell also went into the front room and took some money from the proprietress and then left. Claudie Greer was killed by a shot from a .38 calibre pistol. Witnesses in the back room testified they saw Greer fall after they heard a shot from the front room.

The extensive record contains the testimony of many eyewitnesses. All of them were in a good position to observe the

stickup men at close range over a considerable period of time, and all witnesses positively identified plaintiffs-in-error as the men who perpetrated these brutal murders. Nichols was later arrested with a .38 calibre pistol in his possession, and a sawed-off shotgun was found at the apartment of Mitchell's girl friend. In addition, the Memphis police were given a confession to the crime by Mitchell, the substance of which was related to the jury by the police officer who took it.

In view of the foregoing, we overrule the assignments of error attacking the legal sufficiency of the convicting evidence. It is the often-stated rule that this court cannot reverse on the facts unless the evidence is shown to preponderate against the verdict of the jury and in favor of the innocence of the accused. Plaintiffs-in-error have not made such a showing. *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173.

The third assignment states that it was error not to sustain the plea in abatement to the indictment because the proof showed that no Negro had ever served as foreman of the grand jury, and that the eligible grand jurors were selected from the telephone directory.

The Tipton County jury commissioners were put on the stand during the hearing on this matter, and they testified that they were aware of the need to select a proper racial balance and sought out the names of blacks they knew personally or by reputation. A sizable number of blacks and people of low income were shown to have in fact served on the jury panels. Past grand jury foremen testified as to the presence of blacks on the grand jury. A black who served on the grand jury who indicted plaintiffs-in-error testified that there was no hostility toward Negroes on the part of the other jurors. "The question of whether there has or has not been shown such a systematic exclusion of racial groups as to violate the rights of an accused is, necessarily, largely one of fact in each case." *State v. Johnson*, 220 Tenn. 49, 413 S.W.2d 694. The facts here do

not demonstrate a systematic exclusion of Negroes upon racial grounds, and the assignment of error is overruled.

Plaintiffs-in-error, in their fourth assignment of error, contend that it was error to fail to suppress the pistol and shotgun obtained as a result of their arrest, said arrest being without a warrant and no search warrant having been obtained.

T.C.A. § 40-803 permits an officer to make an arrest, without a warrant, when a felony has in fact been committed, and he has reasonable cause for believing the person arrested committed it. The facts show that the police had reasonable cause to believe plaintiffs-in-error had committed the Tipton County murders, and that they also knew that plaintiffs-in-error were to leave town the following day. Under the circumstances, an arrest was proper. The pistol was found incident to the arrest and was properly admitted into evidence. *Goodner v. State*, 3 Tenn.Crim.App. 569, 464 S.W.2d 339. It also appears that the officers were invited into the apartment to search by its owner, and a search with the permission of the owner is not an unreasonable search. *Deerfield v. State*, 220 Tenn. 546, 420 S.W.2d 649.

The *Deerfield* case also applies with respect to the seizure of the sawed-off shotgun, since it was found at another location pursuant to a search after the owners of the premises had voluntarily given the police permission to search.

The fifth assignment of error complains of the action of the trial court in consolidating for trial the two cases of murder. The cases were properly consolidated because both murders arose out of the robbery of White's Cafe by plaintiffs-in-error. When the offenses charged are similar, related, or connected such consolidation is proper. *State ex rel. Gann v. Henderson*, 221 Tenn. 209, 425 S.W. 2d 616.

The sixth assignment of error argues that it was error not to sever the trials of Mitchell and Nichols because a confession of

Mitchell was read to the jury. Plaintiff-in-error Nichols reasons that this confession, made in his absence, denied him the right to confront Mitchell who did not take the stand. Generally, the granting of a severance addresses itself to the sound discretion of the trial court, and we find no abuse of that discretion here. *O'Neil v. State*, 2 Tenn.Crim.App. 518, 455 S.W.2d 597. No reference to Nichols was made in the confession, and we do not think the jury was prejudiced against Nichols in hearing it. The test in granting a severance is a "likelihood of substantial prejudice" if tried together. *Hoskins v. State*, — Tenn.Crim.App. —, 489 S.W.2d 544. The facts in this case do not meet this test, and the motion for severance was properly denied.

Plaintiffs-in-error, who were indigent, requested a mental examination to determine if they were capable of defending the charges against them. In their seventh assignment of error, they say that it was error for the trial court to refuse to order such an examination. Both plaintiffs-in-error had been before the trial court prior to the request for the mental examination and had presented, pro se, a motion to suppress certain evidence. The trial court had other opportunities to observe them, and concluded that they were capable of conferring with counsel. We find no basis in the record for a holding of prejudicial error in denying the mental examination.

In the eighth assignment of error, plaintiffs-in-error complain of the trial court's failure to grant them a continuance until April 10, 1973 in order to locate additional witnesses who might have been helpful in their defense. Plaintiffs-in-error were indicted on November 6, 1972, and the actual trial commenced on March 21, 1973. The record shows that the trial court did grant a continuance to obtain additional defense witnesses, even bringing in one witness plaintiffs-in-error stated they needed but who was released prior to trial. Four other defense witnesses for whom a continuance had been granted were not put on by the defense.

We have held that a motion for continuance is within the sound discretion of the trial court, and we find no abuse of discretion in denying a continuance. *Frazier v. State*, 3 Tenn.Crim. App. 696, 466 S.W.2d 535. Under the facts in this case, we find that there was a reasonable time in which to prepare a defense, and further delay would have served no purpose. See *State ex rel. Leighton v. Henderson*, 1 Tenn.Crim.App. 598, 488 S.W.2d 82. No prejudice has been demonstrated.

The ninth assignment of error states that the trial court erred in granting a severance as to one Jesse Ford, a co-defendant indicted along with Nichols and Mitchell for the murder of Nabors and Greer. The plaintiffs-in-error contend that by severing Ford's case from theirs, they were deprived of possible help from Ford's testimony who because of his right against self-incrimination, could not be forced to testify against his will on their behalf. That this argument has no merit can readily be seen, since even had Ford been tried with plaintiffs-in-error, he would not have had to take the stand against his will.

The tenth and eleventh assignments of error attack the verdict as returned by the jury. Upon returning from their deliberations, the jury announced that they had found plaintiffs-in-error guilty of murder in the first degree as charged in the indictments, and fixed their punishment "at not less than 30 years and 1 day and not more than 60 years for each count; Nos. 846 and 847". The trial court recognized that this verdict was in improper form, since the indeterminate sentence law does not apply to the capital offenses of murder and rape. *Franks v. State*, 187 Tenn. 174, 213 S.W.2d 195.

Plaintiffs-in-error maintain that the trial court should have declared a mistrial when the jury returned the above verdict, and should not have given them further instructions with examples as to what form the verdict should be. We cannot agree. As was said in *State ex rel. Myers v. Brown*, 209 Tenn. 141, 351 S.W.2d 385, "The Court has the power, and it is

his duty, when a jury offers to return an informal or insufficient verdict, to send them back to the jury room with directions to amend it and put it in proper form". In light of the above, the trial court acted properly and the final two assignments of error are overruled.

Affirmed.

/s/ William S. Russell
Judge

CONCUR:

/s/ Mark A. Walker
Presiding Judge

/s/ W. Wayne Oliver
Judge

In the Supreme Court of Tennessee
At Jackson

James Nichols, Jr. and James Mitchell,
Petitioners,
v.
State of Tennessee,
Respondent.
} Tipton Criminal No. 1

IN RE: PETITION FOR WRIT OF CERTIORARI OF JAMES NICHOLS, JR. AND JAMES MITCHELL

(Filed March 10, 1975)

Upon connsideration of the petition, briefs, and the entire record in the cause, it is the judgment of this Court that the Court of Criminal Appeals has correctly dealt with the issue.

The writ is denied

PER CURIAM

James E. Mitchell 66684
Full name and Prison Number (if any) of Petitioner,

vs.

Jim H. Rose (Warden)
Name of Respondent
(Jailor, Warden).

} Case No. 75-222 (To be supplied by Clerk, U.S. District Court)

PETITION FOR WRIT OF HABEAS CORPUS

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be legibly handwritten or typewritten, signed by the petitioner and verified (notarized), and it shall set forth in concise form the answer to each applicable question. If necessary, petitioners may complete the answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make clear which question any such continued answer refers to.

If you challenge more than one conviction or sentence, you must do so by separate petitions unless your claims for relief arise out of the same proceeding.

A petition is not a legal brief. Refer only to cases you were involved in leading up to this petition. You may file a separate memorandum of authorities.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis* (on a pauper's oath) it shall include an affidavit (attached to the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. Even though you may be allowed to file your petition on a pauper's oath, costs may be adjudged against you and execution issued if it later appears that you have sufficient funds.

When the petition is completed, the *original and two (2) copies* shall be mailed to:

Clerk, United States District Court
Western District of Tennessee
Federal Building
Memphis, Tennessee 38103

PETITIONS NOT CONFORMING TO THESE INSTRUCTIONS WILL BE RETURNED

1. Place of detension: Tennessee State Penitentiary.
2. Name and location of court which imposed sentence: Criminal Court of Tiption County Covington, Tennessee.
3. The indictment number, or numbers, if known, connected with the offense or offenses for which sentence was imposed:
   (a) NO 447
   (b) NO 448
   (c) ....
4. The date sentence was imposed and the terms of the sentence:
   (a) March 22, 1973
   (b) Sixty Years for 1st, deg murder
   (c) Sixty Years for Aid & abeding, Concetively.

5. Check whether finding of guilty was made:
   (a) after a plea of guilty ....
   (b) after a plea of not guilty X
   (c) after a plea of *nolo contendere* ....
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) a jury X
   (b) a judge without a jury
7. Did you appeal from the judgement of conviction or the imposition of sentence? Yes
8. If your answer to number 7 was "yes" list the following:
   (a) the name of each court you appealed to:
      I The Tennessee Criminal Court of Appeals
      II Tennessee State Supreme Court, Jackson, Tenn.
   (b) the results in each court you appealed to:
      I Affirmed
      II Affirmed
   (c) the date of each result:
      I June 5, 1974
      II March 10, 1975
   (d) citations of any written opinions or orders entered pursuant to such results, if known:
      I NON
      II NON
9. If your answer to number 7 was "no," give your reasons for not appealing:
10. Prior to this petition have you filed any of the following with respect to this conviction:
   (a) any petition for habeas corpus in state or federal courts? NON

(b) any petition in state court under any post conviction procedure laws? no

(c) any petition in state court by way of coram nobis? no

(d) any petition in the United States Supreme Court for certiorari other than petitions, if any, already given in answer to number 8? no

(e) any other petitions, motions or applications in this or any other court? no

11. If you answered "yes" to any part of number 10, list the following with respect to each petition, motion or application:

(a) the name and location of the court in which each petition, motion or application was filed:

I non

II non

III non

IV non

(b) the specific nature of each petition, motion or application:

I non

II non

III non

IV non

(c) the disposition of each petition, motion or application:

I NoN

II NoN

III NoN

IV NoN

(d) the date of each such disposition:

I NoN

II NoN

III NoN

IV NoN

(e) citations of any written opinions or orders entered pursuant to each such disposition, if known:

I NON

II NoN

III NoN

IV NoN

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Do not cite cases except those in which you were involved.

There is no evidence to support said verdicts.

The evidence preponderates against guilty verdicts and in favor of their innocence, (3) the court erred in not sustaining pleas in abatement of defendants alleging racial discrimination in the selecting of the foreman of the Grand Jury and Jury commissioners.

(4) The Court erred in not sustaining motion of defendants to supress exhibits of a .38 caliber pistol and a sawed-off shot gun obtained during their arrest without a criminal warrant.

(5) The Court erred in not sustaining application of defendants for separate trials in the two indictments charging them with first degree murders of Claudie Greer and Wm. A. Nabors.

(6) The alleged confession of James Mitchell incriminates by inference.

(7) The Court erred in not sustaining of petitions of defendants for a admission to a state Institution for mental observation and report to the Court under provision of SEC. 33-701, TCA.

(8) The Court erred in not continuing defendants' cases until April 16th 1973, in order for them to locate witnesses.

(9) The Court erred in granting motion for severance of the co-defendant Jesse Ford jointly indicted with defendants.

(10) The Court erred in not ordering a mistrial in said two cases when the jury returned a verdict finding defendants guilty of first-degree murder and setting their penalty at "not less than thirty (30) years and a day and not more than Sixty (60) years on each Count," and in ordering the jury to return to the jury room for further consideration of said case.

(11) The Court erred in calling the jury back from the jury room and giving them examples of possible maximum sentences they could impose upon said defendants in said case.

That the Trial Court erred in not granting defendant's motion for a new trial and both cases should be reversed and remanded to the lower Court for a new trial.

State Concisely and in the same order the facts which support each of the grounds set out in number 12. Do not cite cases except those in which you were involved.

I

The defendants James Nichols, Jr. and James Mitchell were arrested without criminal warrants or search warrants on October 29, 1972, in an apartment occupied by the States Witness, Antoinette Gilchrist, at 661 St. Paul, Memphis, Tennessee, who in response to knocks of police officers opened her apartment door which was entered by the officers, who made observation and first searched same before securing a consent from her (B.E. Vol. III pp. 164-167, 170-172).

II

A .38 caliber snubnose pistol and ring, subsequently made exhibits in the trial of the said cases, were obtained by the officers at the time of the search of the apartment at 661 St. Paul on October 29, 1972; and the said pistol was not identified as the pistol used at Sunny Mans Club in Tipton County, Tennessee, on October 28, 1972, in the commission of the crimes for which defendants James Nichols, Jr. and James Mitchell were indicted, tried and convicted (B. E. Vol. III pp 175, L77-181).

III

A sawed-off shotgun, obtained by officers on October 29, 1972, at the home of Mildred Jones and State witness, Eddie Mae Jones, at 1054 Claybrook, Memphis, Tennessee, as a result of a consent to search, was introduced as an exhibit at the trial of the defendants without being identified as the sawed off-shotgun used at Sunny Man's Club in Tipton County, Tennessee, on October 28, 1972, in the commission of the crimes for which these defendants were indicted, tried and convicted. The said shotgun was brought to the said home by a person other than either defendants James Mitchell or James Nichols, Jr. (B. E. Vol. III 181-184; 187).

IV

No witness who testified in regards to the allegations in the defendant's plea in abatement to the indictments indicated that a negro ever served as foreman of the grand jury in Tipton County, Tennessee, and the Jury Commissioners had selected the current jury panel, out of which the trial jury in these cases was chosen, from recently published telephone directories, selecting therefore only the persons, both black and white, whom they knew, either in person or by their reputations, and all others of both races were excluded (B. E. Vol. pp. 55-82).

V

Defendant James Nichols, Jr. was not present in the Security Unit in John Gaston Hospital, Memphis, Tennessee, shortly after October 28, 1972, when defendant James Mitchell allegedly made an admission that on October 28, 1972 he took a sawed-off shotgun and went into Sunny Man's Club in Tipton County, Tennessee, and shot twice, but did not know if he killed anyone; and defendant James Mitchell did not testify as a witness in his own behalf in the trial of the said two cases, wherein he was jointly tried with defendant James Nichols, Jr. (B. E. Vol. III 297-300; B. E. Vol. IV 303-307).

VI

After the charge of the Trial Court the trial jury, who had jointly tried defendants James Nichols, Jr. and James Mitchell in said two consolidated cases, retired to the jury room, and after deliberating therein, returned to the courtroom and announced to the Court they had found said defendants guilty of first degree murder and set the penality for each of the defendants at not less than 30 years and 1 day and not more than 60 years for each count. Nos. 846 and 847. The Trial Judge accepted their findings of guilt but asked the jury to retire once again and fix the maximum punishment only for each defendant in each case, whereupon he read to them again the punishment. The jury again retired but were recalled to the court room where the Trial Judge charged them that they may fix the punishment at life in the Penitentiary or at any number of years between 20 years and a day, 30 years, 40 years, 60 years, 75 years, 99 years, or any other number of years above 20 years (B. E. Vol. IV, pp 353-360).

VII

After the foregoing instructions by the Trial Court the jury again retired deliberated and returned with a verdict stating: "we, the

jury, find James Nicholas, Jr. and James Mitchell guilty of First Degree Murder on two counts; Nos. 846 and 847, and set the penalty for each of the defendants at a maximum of 60 years on count NO. 846 and set the maximum penality for each of the defendants at a maximum of 60 years on Count NO. 847" (B. E. Vol. 4, p 359).

14. Has any ground set forth in number 12 been previously presented to this or any other court, state or federal, in any petition, motion or application? Non

15. If your answer to number 14 is "yes" identify:

(a) which grounds have previously presented:

I Non
Non

II Non
Non

III Non
Non

(b) the proceedings in which each ground was raised;

I Non
Non

II Non
Non

III Non
Non

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) Your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? Yes

17. If the answer to any part of number 16 was "yes" list the following:

(a) the name and address of each attorney who represented you:

I Wilbur Cash, 104-106 Abernathy Bldg. Covington, Tennessee.

II .....

.....

II .....

.....

III .....

.....

(b) the proceeding in which such attorney represented you:

II All of the above mentionings

II .....

III .....

18. If you are seeking leave to proceed *in forma pauperis* (on a pauper's oath), have you completed the sworn affidavit setting forth the required information (see instructions at the beginning of this form)? Yes

/s/ JAMES E. MITCHELL
(Signature of Petitioner)

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Michell,
Petitioner,
v.
Jim H. Rose, Warden,
Respondent.
Civil C-75-222

ORDER TO SHOW CAUSE

(Filed May 19, 1975)

It appearing that James E. Mitchell, who is a prisoner of the State of Tennessee, has filed a petition for writ of habeas corpus attacking his conviction and sentence imposed in the Criminal Court of Tipton County, Tennessee;

It is ORDERED that respondent show cause why the writ and the relief prayed for in the petition should not be granted and, good cause appearing, respondent is allowed 23 days in which to answer.

It is further ORDERED that respondent file with his answer a copy of the technical record and trial transcript as well as any opinions on appeal of the conviction.

ENTER this 19th day of May, 1975.

/s/ BAILEY BROWN
CHIEF JUDGE

(Illegible)

(Illegible)
/s/ By (Illegible)
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

James E. Mitchell, Petitioner

vs.

Jim H. Rose, Warden, Respondent

Civil No. C-75-222

RESPONSE TO ORDER TO SHOW CAUSE

Comes the respondent, Jim H. Rose, Warden, and makes response to the Order of the Court, filed May 19, 1975, to show cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. The Writ should be denied, and the relief sought should not be granted.

Exhaustion of State Remedies

Although the Petition shows on its face (p. 3) that the petitioner has sought no relief under Tennessee's Post-Conviction Procedure Act, this Petition is a paraphrase of the Assignments of Error filed by the petitioner upon his direct appeal, and passed upon by appellate courts of Tennessee. Therefore, the petitioner has exhausted his remedies at state law before commencing this action.[1]

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[1] *See Arthur v. State*, 483 S.W.2d 95 (Tenn. 1972).

Grounds for Petition

I-II

"1. **There is no evidence to support said verdict."**

"2. **The evidence preponderates against guilty verdicts and in favor of their innocence."**

These two grounds allege insufficient evidence for conviction. Unless there is a near-complete absence of evidence, this is not a ground upon which federal Habeas Corpus Relief may be granted.[2] The trial transcript in this case clearly shows that there was ample evidence, based upon personal identification of the petitioner by numerous witnesses and upon his confession, that he personally shot one man to death while participating in a robbery during which another man was also shot and killed. There is no merit, therefore, to this asserted ground.

III

"3. **The Court erred in not sustaining pleas in abatement of defendants alleging racial discrimination in the selection of the foreman of the Grand Jury and Jury Commissioners."**

The Trial Judge conducted a hearing on the question of racial discrimination in the selection of grand jurors and jury commissioners, which is found at Volume I, pp. 54-96. Evidence presented in that hearing shows that grand jurors were aware of the need to avoid racial discrimination, and that they did all that they could to assure that blacks whom they knew to be of good character were included as grand jurors. Finally, there was testimony that there was no hostility whatever among the grand

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[2] *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968), *cert. denied*, 393 U.S. 1108.

jurors toward the petitioner because of his race. The petitioner has failed to carry his burden of proof that there was systematic exclusion of blacks from the grand jury which indicted him.[3]

IV

"4. The Court erred in not sustaining motion of defendants to surpress exhibits of a .38 caliber pistol and a sawed-off shot gun obtained during their arrest without a criminal warrant."

This ground of the Petition is without merit. The Trial Court conducted a hearing on the legality of these two searches which resulted in the seizure of a pistol, a ring, and a shotgun (Vol. I, pp. 6-53, 96). Testimony in that hearing showed that in response to a telephone call by a reliable informant to Memphis police, made late at night, saying that the men who had committed the murders in Tipton County were at a certain address and that they were going to leave town in the morning, the police went directly to the address given, since there was not time for them to obtain a warrant. They knocked on the door and were admitted, and as they walked in they saw the co-defendant of this petitioner standing in the apartment with a pistol in his hand. They obtained a consent to search the premises from the lessee, and did so, arresting this petitioner and seizing the pistol and a ring taken in the robbery. Later, upon obtaining consent to search another apartment, they went there and found a shotgun left there by this petitioner. It is obvious from the Record that no unreasonable search or seizure was made, and the evidence seized was properly admitted. The police acted with reasonable cause to believe that the men in the first apartment were the murderers sought, and they lawfully entered the apartment to arrest them, after which entry the ring and the pistol were in plain view, and the pistol was near enough that its seizure was the result of a search incident to the lawful arrest of the men.

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[3] *Swain v. Alabama*, 380 U.S. 202 (1965).

It also is clear that the men were admitted to the apartment by the tenant, who also signed a consent to the search. A question was raised regarding at what time during the search the consent had been signed, but this cannot be material since a consent made during a search is a more informed consent than one made before a search. In addition, the second search, during which the shotgun used by the petitioner to kill his victim was seized, was made at the instance of the tenant and with her signed consent. The petitioner was deprived of no constitutional or statutory right by the actions of the police during these searches.

In summary, the search was made upon probable cause, [4] and it can also be justified as incident to a lawful arrest,[5] and during which the items were in plain view. [6] In addition, the searches were made with the consent of the person with the right to control the premises, [7] and the petitioner lacked standing to complain of the search. [8]

V

"5. The Court erred in not sustaining application of defendants for separate trials in the two indictments charging them with first degree murders of Claudie Greer and Wm. A. Nabors."

This contention is without merit, the petitioner having failed to point out any prejudice, much less deprivation of constitutional rights, caused by his trial with James Nichols.

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[4] *U.S. v. McKinney*, 379 F.2d 259 (6th Cir. 1967).

[5] *U.S. v. Manarite*, 448 F.2d 583 (2d Cir. 1971), *cert. denied*, — U.S. —.

[6] *U.S. v. Glassel*, 448 F.2d 143 (9th Cir. 1973), *cert. denied*, 416 U.S. 941.

[7] *McCravy v. Moore*, 476 F.2d 281 (6th Cir. 1973).

[8] *See U.S. v. Hearn*, 496 F.2d 236 (6th Cir. 1974), *cert. denied*, — U.S. —.

VI

"6. **The alleged confession of James Mitchell incriminates by inference, jam James [Nichols], Jr. who was not present.**"

This contention is without merit; it could be asserted only by James Nichols, and not by this petitioner, James Mitchell, who is the one who made the confession.

VII

"7. **The Court erred in not sustaining of [petitions of] defendants for a admission to a state Institution for mental observation and report to the Court under provision of SEC. 33-701, T. C. A.**"

The Trial Judge conducted a hearing on this question, the Record of which is found at pp. 1-16, which begins following page 104 of Volumn I of the Record. This would not be a ground for Habeas Corpus Relief unless a defendant were so mentally incapable of participating in his trial and putting forth his best defense that it was a denial of due process of law. It is apparent from the Record that the petitioner participated fully in his defense, and that the Trial Judge was within his discretion in holding that the petitioner was competent to stand trial.

VIII

"8. **The Court erred in not continuing defendants' cases until April-16th 1973, in order for them to locate witnesses.**"

This contention is without merit, the petitioner having failed to show that he was prejudiced in any way by the Trial Court's failure to order an additional continuance so that the petitioner and his co-defendant could locate other witnesses whom they

claimed to exist. The Trial Court's efforts to accomodate the defendants' requests for additional witnesses are shown in the Record at Vol. II, pp. 2-33, Vol. IV, pp. 318-319. The witnesses whom the defendant did call, Lonnie Williams (Vol. IV, p. 308) and James Jackson (B. E. 320), were unable to add anything to their defense. There was no showing at the time, and there is no showing now, that there is in existence any person who can add anything to the defense of the petitioner. The Trial Court's refusal to continue the trial indefinitely, to indulge the petitioner's hope that some elusive witness might some day be found, did not deprive the petitioner of any constitutional or statutory right.

IX

9. **The Court erred in granting motion for severance of the co-defendant Jesse Ford jointly indicted with defendants.**"

The petitioner has not shown any way in which he was prejudiced by the severance of Jesse Ford.

X-XI

"10. **The Court erred in not ordering a mistrial in said two cases when the jury returned a verdict finding defendants guilty of first-degree murder and setting their penalty at "not less than thirty (30) years and a day and not more than sixty (60) years on each count," and in ordering the jury to return to the jury room for further consideration of said case.**"

"11. **The Court erred in calling the jury back from the jury room and giving them examples of possible maximum sentences they could impose upon said defendant in said case.**"

These grounds allege constitutional error in the Trial Court's handling of the jury's erroneous sentence. The jury first announced that it had found the petitioner and his co-defendant

guilty of first-degree murder, and that it had set a sentence of not less than thirty (30) years nor more than sixty (60) years of each of the two counts. This sentence was inconsistent with the verdict: the sentence was in "indeterminate" form, which is required for sentences for some crimes by T.C.A. § 40-2707. That statute applies only to offenses for which punishment must be set "within minimum and maximum terms." The punishment precribed for conviction of first-degree murder, however, is not in this form, because there is no maximum term set by the Act. Therefore, T.C.A. § 40-2707 does not apply where a conviction is for first-degree murder.[9] When the jury announced that it had found the defendant guilty of first-degree murder, yet expressed its sentence in indeterminate form, the Trial Judge therefore had to send the jury back for reconsideration of the punishment. After reconsidering the matter, the jury returned its sentence in the correct form, and it was properly accepted by the Trial Court. This is no ground for Habeas Corpus relief; the practice, which has been approved by the appellate courts of Tennessee,[10] is a reasonable method of meeting such a problem. The jury had reached a verdict on the guilt of the defendant, and there was no reason to think that that verdict would change just because the sentence would have to be changed; if the jury had felt that it would have said so at the announcement of the second sentence.

Summary

The petitioner has shown no deprivation of constitutional or statutory right which would entitle him to federal Habeas Corpus Relief. The respondent respectfully suggests that the Record of the petitioner's trial is sufficient for the determination of all matters raised in this Petition, and that no evidentiary hearing will be required in this cause.

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[9] *Miller v. State*, 520 S.W.2d 729 (Tenn. 1975).

[10] *Jenkins v. State*, 509 S.W.2d 240 (Tenn. Crim. App. 1974).

WHEREFORE, PREMISES CONSIDERED, THE RESPONDENT PRAYS THAT THIS ACTION BE DISMISSED.

Respectfully submitted,

/s/ TOM JENNINGS
Assistant Attorney General
414 Supreme Court Building
Nashville, Tennessee 37219
(615) 741-2250

Certificate of Service

I hereby certify that I mailed a copy of this Response to Mr. James E. Mitchell, No. 66684, Tennessee State Penitentiary, Nashville, Tennessee, this 9 day of June, 1975.

/s/ TOM JENNINGS
Assistant Attorney General

James H. Nichols Jr. 58054
Full Name and Prison Number (if any) of Petitioner

vs.

Jim H. Rose, Warden
Name of Respondent (Jailor, Warden).

Case No. C-75-265 (To be supplied by Clerk, U.S. District Court)

PETITION FOR WRIT OF HABEAS CORPUS

(Filed June 11, 1975)

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be legibly handwritten or typewritten, signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may complete the answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make clear which question any such continued answer refers to.

If you challenge more than one conviction or sentence, you must do so by separate petitions unless your claims for relief arise out of the same proceeding.

A petition is not a legal brief. Refer only to cases you were involved in leading up to this petition. You may file a separate memorandum of authorities.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis* (on a pauper's oath) it shall include an affidavit (attached to the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. Even though you may be allowed to file your petition on a pauper's oath, costs may be adjudged against you and execution issued if it later appears that you have sufficient funds.

When the petition is completed, the *original and two (2) copies* shall be mailed to:

Clerk, United States District Court
Western District of Tennessee
Federal Building
Memphis, Tennessee 38103

PETITION NOT CONFORMING TO THESE INSTRUCTIONS WILL BE RETURNED

• • • • • • • •

2. Name and location of court which imposed sentence: Criminal Court of Tipton County, Covington, Tennessee

3. The indictment number, or numbers, if known, connected with the offense or offenses for which sentence was imposed:

   (a) NO. 447

   (b) NO. 448

   (c) .....

4. The date sentence was imposed and the terms of the sentence:

(a) March 22, 1973

(b) Sixty Years for First deg. Murder

(c) Sixty Years for abeding, Consecutively

5. Check whether a finding of guilty was made:

(a) after a plea of guilty .....

(b) after a plea of not guilty X

(c) after a plea of *nolo contendere*

5. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury X

(b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If your answer to number 7 was "yes" list the following:

(a) the name of each court you appealed to:

I Tennessee Criminal Court of Appeals
II Tennessee State Supreme Court, Jackson, Tenn.

(b) the result in each court you appealed to:

I Affirmed

II Affirmed

(c) the date of each such result:

I June 5, 1974

II March 10, 1975

(d) citations of any written opinions or orders entered pursuant to such results, if known:

I Non
II Non

9. If your answer to number 7 was "no," give your reasons for not appealing: Non

10. Prior to this petition have you filed any of the following with respect to this conviction:

(a) any petition for habeas corpus in state or federal courts? Non

(b) any petition in state court under any post conviction procedure laws? Non

(c) any petition in state court by way of *coram nobis*? Non

(d) any petition in the United States Supreme Court for certiorari other than petitions, if any, already given in answer to number 8? Non

(e) any other petitions, motions or applications in this or any other court? Non

11. If you answered "yes" to any part of number 10, list the following with respect to each petition, motion or application:

(a) the name and location of the court in which each petition, motion or application was filed:

I Non

II Non

III Non

IV Non

(b) the specific nature of each petition, motion or application:

I Non

II Non

III Non

IV Non

(c) the disposition of each petition, motion or application

I Non
II Non
III Non
IV Non

(d) the date of each such disposition:

I Non
II Non
III Non
IV Non

(e) citations of any written opinions or orders entered pursuant to each such disposition, if known:

I Non
II Non
III Non
IV Non

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Do not cite cases except those in which you were involved.

1

There is no evidence to support said verdict in each of the above styled and numbered cases.

2

The evidence perponderates against the verdict of guilt and in favor of the innocence of the defendants James Nichols, Jr. and James Mitchell, in each of the above styled and numbered cases.

3

The Court erred in not sustaining the pleas in abatement of said defendants James Nichols, Jr. and James Mitchell to the indictments in each of the above styled and numbered cases on the grounds of discrimination the Uncontradicted evidence showing that no negro has ever serevd as foreman of the Grand Jury of Tipton County, Tennessee, and the jury commissioners selected the current eligible jurors from telephone directories thus eliminating the poor class of persons who have no telephone as well as persons with unlisted telephone numbers.

4

The Court erred in not sustaining the motion of defendants James Nichols, Jr. and James Mitchell to supress the introduction by the State of Exhibits of a 38. caliber pistol and a sawed-off shotgun by officers which were obtained during the course of an arrest without a criminal warrant or a search warrant for alleged offenses not committed in the presence of the arresting officers.

5

The Court erred in not sustaining the application of the said defendants James Nichols, Jr. and James Mitchell for separate trials in the above styled and numbered cases, One indictment charging said defendants and others with the murder of one Claudie Greer and the other indictment charging said two defendants and other with the murder of one William Nabors.

6

The Court erred in not sustaining the application of said defendants James Nichols, Jr. and James Mitchell, for severance of their

trial in each of the above styled numbered cases as testimony was subsequently introduced by an officer testifying for the State of an alleged confession or admission on part of the defendant James Mitchell which was not made in the presence or hearing of the defendant James Nichols, Jr. and as defendant James Mitchell did not take the witness stand to testify in his own behalf, this evidence was to some extent incriminating against defendant James Nichols, Jr. who testified in his own behalf.

7

The Court erred in not sustaining the petition of the attorneys of record for the defendants James Nichols, Jr. and James Mitchell praying for said two to be admitted to some appropriate State Institution for a period not exceeding 30 days for observation and to report to the Court on their mental condition under the provision of Code Section 33-701 of the Tennessee Code Annotated.

8

The Court erred in not granting the motion of defendants James Nichols, Jr. to continue their cases until April 16, 1973, in order to give them additional time in which to locate the addresses of witnesses which might have been helpful in their defense.

9

The Court erred in granting the motion of Jesse Ford, a codefendant of the defendants James Nichols, Jr. and James Mitchell and who was jointly indicted with said two defendants in each of the above styled and numbered cases from their cases, thus depriving defendants James Nichols, Jr., and James Mitchell of possible help from the testimony of said co-defendant Jesse

Ford who because of his constitutional rights against self incrimination could not be forced to testify in behalf of the defendants James Nichols, Jr. and James Mitchell.

10

The Court erred in not ordering a mistrial of the above styled and numbered cases after the jury returned a verdict finding defendants James Nichols, Jr. and James Mitchell guilty of first degree murder and setting their penalty at "not less than 30 years and a day and not more than sixty years on each count," and in ordering the jury to return to the jury room for a further consideration of the above styled and numbered cases.

11

The Court erred in calling the jury back from the jury room and giving them further instruction especially examples of possible maximum sentencing which they could impose upon the defendants in each of the above cases.

State concisely and in the same order the facts which support each of the grounds set out in number 12, do not cite cases except those in which you were involved

I

The defendants James Nichols, Jr. and James Mitchell were arrested without a criminal warrant or search warrant on October 29, 1972, in an apartment occupied by the State's witness, Antoinette Gilchrist, at 661 St. Paul, Memphis Tennessee, who in response to knocks of police officers opened her apartment door which was entered by officers, who made observation and first searched same before securing a consent to search from her (B.E. Vol. III pp 164-167, 170-172).

2

A 38. caliber pistol and a ring, subsequently made exhibits in the trial of said cases, were obtained by officers at the time of the said search of the apartment at 661 St. Paul on October 29, 1972; and said pistol was not identified as the pistol used at Sunny Man's Club in Tipton County, Tennessee, on October 28, 1972 in the commission of the crime for which defendants James Nichols, Jr. and James Mitchell were indicted, tried and convicted. (B.E. Vol. III pp 178, 177-181).

3

A sawed-off shotgun, obtained by officers on October 30, 1972, at the home of Mildred Jones and State witness, Eddie Mae Jones, at 1054 Claybrook, Memphis, Tennessee, as a result of a consent to search, was introduced as an exhibit at the trial of the defendants without being identified as the sawed off shotgun used at Sunny Man's Club in Tipton County, Tennessee, on October 28, 1972, in the commission of the crime for which these defendants were indicted, tried, and convicted. The said shotgun was brought to the said home by a person other than either defendants James Nichols, Jr. and James Mitchell. (B.E. Vol. III pp 181-184, 187);

4

No witness who testified in regards to the allegations in the defendants' plea in abatement to the indictments indicated that a negro ever served as foreman of the Grand jury in Tipton County, Tennessee, and the jury commissioner had selected the current jury panel, out of which the trial jury in these cases was chosen, from recently published telephone directories, selecting therefore only the persons, both black and whites, whom they knew either in person or by their reputations, and all other of both races were excluded (B.E. Vol. I pp. 55-82).

5

Defendant James Nichols, Jr., was not present in the security unit in John Gaston Hospital, Memphis, Tennessee, shortly after October 28, 1972, when defendant James Mitchell allegedly made an admission that on October 28, 1972, he took a sawed-off shotgun and went into Sunny Man's Club in Tipton County, and defendant James Mitchell did not testify as a witness in his behalf in the trial of the said cases wherein he was jointly tried with defendant James Nichols, Jr. (B.E. Vol. IV 303-307).

6

After the charge of the Trial Court the trial jury who had jointly tried defendants James Nichols, Jr. and James Mitchell in said two consolidated cases, retired to the jury room, and after deliberations therein, returned to the courtroom and announced to the Court they had found said defendants guilty of first degree murder and set the penalty for each of the defendants at not less than thirty years and one day and not more than sixty years for each count, Nos. 846 and 847. The Trial Judge accepted their findings of guilt but asked the jury to retire once again and fix the maximum punishment only for each defendant in each case, whereupon he read them again the punishment at life in the penitentiary or at any number of years between 20 years and a day and life, that is, that is, 20 years and a day, 30 years, 40 years, 60 years, 75 years, 99 years, or any other number of years above 20 years. (B.E. Vol. IV, pp 353-360)

7

After the foregoing instruction by the Trial Court, the jury again retired (Illegible) Nichols, Jr. and James Mitchell guilty of first

degree murder on two counts; Nos. 847 and 848, and set the penalty for each of the defendants at a maximum penalty for each of the defendants at a maximum of sixty years on count No. 847" (B.E. Vol. 4, p. 359).

14. Has any ground set forth in number 12 been previously presented to this or any other court, state or federal, in any petition, motion or application? No

15. If your answer to number 14 is "yes" identify

(a) which grounds have been previously presented

I Non
Non

II Non
Non

III Non
Non

(b) the proceedings in which each ground was raised

I Non
Non

II Non
Non

III Non
Non

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? Yes

17. If your answer to any part of number 16 was "yes" list the following:

(a) the name and address of each attorney who represented you:

I Wilbur Cash—106 Abernathy Bldg.
Covington

II All of the above mentionings

. . . . . .

III . . . . . .

. . . . . .

(b) the proceeding in which such attorney represented you:

I . . . . . .

II . . . . . .

III . . . . . .

18. If you are seeking leave to proceed *in forma pauperis* (on a pauper's oath), have you completed the sworn affidavit setting forth the required information (see instructions at the beginning of this form)? Yes

/s/ JAMES NICHOLS, JR. 58054
(Signature of Petitioner)

In the United States District Court
For the Western District of Tennesee
Western Division

James Nichols, Jr., Petitioner,
v.
Jim H. Rose, Warden, Respondent.
Civil C-75-265

ORDER TO SHOW CAUSE

(Filed June 13, 1975)

It appearing that James Nichols, Jr. has filed a petition for writ of habeas corpus, it is ORDERED that respondent show cause why the petition and the relief prayed for therein should not be granted, and good cause appearing, respondent is allowed 23 days in which to answer.

It appears that petitioner was a codefendant in the Criminal Court of Tipton County with James E. Mitchell, who has filed a habeas petition in this court (C-75-222) as to which respondent has answered, and the technical record, transcript, etc. have been filed along with the answer. It will therefore not be necessary for respondent to attach such documents to his answer in this cause and this cause will be consolidated with C75-222 for handling.

It is so ORDERED.

ENTER this 11th day of June, 1975.

/s/ (Illegible)
CHIEF JUDGE

In the United States District Court
For the Western District of Tennessee
Western Division

James Nichols, Jr.
vs.
Jim H. Rose, Warden
Civil No. C-75-265

RESPONSE TO ORDER TO SHOW CAUSE

Comes the respondent, Jim H. Rose, Warden, and makes response to the Order of the Court, filed June 11, 1975, to show cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. The Writ should be denied, and the relief sought should not be granted.

Exhaustion of State Remedies

Although the Petition shows on its face (p. 3) that the petitioner has sought no relief under Tennessee's Post-Conviction Procedure Act, this Petition is a paraphrase of the Assignments of Error filed by the petitioner upon his direct appeal, and passed upon by appellate courts of Tennessee. Therefore, the petitioner has exhausted his remedies at state law before commencing this action.[1]

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[1] *See Arthur v. State*, 483 S.W.2d 95 (Tenn. 1972).

Responses to Grounds for Petition

I-II

There Is Evidence to Support the Verdict and the Evidence Does Not Preponderate Against the Verdict of Guilt and in Favor of the Innocence of the Petitioner.

These two grounds allege insufficient evidence for conviction. Unless there is a near-complete absence of evidence, this is not a ground upon which federal Habeas Corpus Relief may be granted.[2] The trial transcript in this case clearly shows that there was ample evidence, based upon personal identification of the petitioner by numerous witnesses and upon his confession, that he personally shot one man to death while participating in a robbery during which another man was also shot and killed. There is no merit, therefore, to this asserted ground.

III

The Court Did Not Err in Dismissing the Petitioner's Plea in Abatement to His Indictment, Which Was Based Upon a Claim of Racial Discrimination in the Selection of the Foreman of the Grand Jury and of the Jurors Themselves.

The Trial Judge conducted a hearing on the question of racial discrimination in the selection of grand jurors and jury commissioners, which is found at Volume I, pp. 54-96. Evidence presented in that hearing shows that grand jurors were aware of the need to avoid racial discrimination, and that they did all that they could to assure that blacks whom they knew to be of good character were included as grand jurors. Finally, there was testimony that there was no hostility what-

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[2] *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968), *cert. denied*, 393 U.S. 1108.

ever among the grand jurors toward the petitioner because of his race. The petitioner has failed to carry his burden of proof that there was systematic exclusion of blacks from the grand jury which indicted him.[3]

IV

The Court Did Not Err in Overruling the Petitioner's Motion to Suppress the Introduction Into Evidence of a Pistol and a Sawed-off Shotgun Seized at the Arrest of the Petitioner.

This ground of the Petition is without merit. The Trial Court conducted a hearing on the legality of these two searches which resulted in the seizure of a pistol, a ring, and a shotgun (Vol. I, pp. 6-53, 96). Testimony in that hearing showed that in response to a telephone call by a reliable informant to Memphis police, made late at night, saying that the men who had committed the murders in Tipton County were at a certain address and that they were going to leave town in the morning, the police went directly to the address given, since there was not time for them to obtain a warrant. They knocked on the door and were admitted, and as they walked in they saw this petitioner, James Nichols, standing in the apartment with a pistol in his hand. They obtained consent to search the premises from the tenant, and did so, arresting this petitioner and seizing the pistol and a ring taken in the robbery. Later, upon obtaining consent to search another apartment, they went there and found a shotgun left there by Mitchell. It is obvious from the Record that no unreasonable search or seizure was made, and the evidence seized was properly admitted. The police acted with probable cause to believe that the men in the first apartment were the murderers sought, and they lawfully entered the apartment to arrest them, after which entry the ring and the pistol were in plain view, and the pistol was near enough that its seizure was the result of a

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[3] *Swain v. Alabama*, 380 U.S. 202 (1965).

search incident to the lawful arrest of the men. It also is clear that the men were admitted to the apartment by the tenant, who also signed a consent to the search. A question was raised regarding at what time during the search the consent had been signed, but this cannot be material since a consent made during a search is a more informed consent than one made before a search. In addition, the second search, during which the shotgun used by Mitchell to kill his victim was seized, was made at the instance of the tenant and with her signed consent. The petitioner was deprived of no constitutional or statutory right by the actions of the police during these searches.

In summary, the search was made upon probable cause,[4] and it can also be justified as incident to a lawful arrest,[5] and during which the items were in plain view.[6] In addition, the searches were made with the consent of the person with the right to control the premises,[7] and the petitioner lacked standing to complain of the searches.[8]

V

The Court Did Not Err in Refusing to Sever the Trial of the Petitioner and His Co-Defendant, James E. Mitchell.

This contention is without merit, the petitioner having failed to point out any prejudice, much less deprivation of constitutional rights, caused by his trial with James E. Mitchell.

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[4] *U.S. v. McKinney*, 379 F.2d 259 (6th Cir. 1967).

[5] *U.S. v. Manarite*, 448 F.2d 583 (2d Cir. 1971), *cert. denied*, — U.S. —.

[6] *U.S. v. Glassel*, 448 F.2d 143 (9th Cir. 1973), *cert. denied*, 416 U.S. 941.

[7] *McCravy v. Moore*, 476 F.2d 281 (6th Cir. 1973).

[8] *See U.S. v. Hearn*, 496 F.2d 236 (6th Cir. 1974), *cert. denied*, — U.S. —.

VI

The Court Did Not Err in Allowing Into Evidence Testimony as to the Substance of James E. Mitchell's Confession.

This contention is without merit. The Record shows (B.E. 305-06) that Lt. L. M. Rose testified that James Mitchell made a statement in which he incriminated himself in the shootings which resulted in the deaths of the two victims. No reference was made in this testimony to any other persons who might have been with James Mitchell at the time. Because of the careful excision of any reference to James Nichols, the petitioner herein, he could not have been prejudiced by the admission of the testimony of the contents of James Mitchell's statement.[9]

VII

The Trial Court Did Not Err in Denying the Petitioner's Request for a Mental Evaluation.

The Trial Judge conducted a hearing on this question, the record of which is found at pp. 1-16, which begins following page 104 of Volume I of the Record. This should not be a ground for Habeas Corpus Relief unless a defendant were so mentally incapable of participating in his trial and putting forth his best defense that it was a denial of due process of law. It is apparent from the Record that the petitioner participated fully in his defense, and that the Trial Judge was within his discretion in holding that the petitioner was competent to stand trial.

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[9] *Brown v. U.S.*, 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973) (harmless error); *United States ex rel. Smith v. Montanye*, 505 F.2d 1355 (2d Cir. 1974) (statement cumulative); *United States v. Wilson*, 500 F.2d 715 (5th Cir. 1974) (Court excised incriminating portions).

VIII

The Court Did Not Err in Refusing to Continue the Petitioner's Trial to Give Him Additional Time in Which to Locate Witnesses.

This contention is without merit, the petitioner having failed to show that he was prejudiced in any way by the Trial Court's failure to order an additional continuance so that the petitioner and his co-defendant could locate other witnesses whom they claimed to exist. The Trial Court's efforts to accommodate the petitioners' request for additional witnesses are shown in the Record at Vol. II, pp. 2-33, Vol. IV, pp. 318-319. The witnesses whom the defendants did call, Lonnie Williams (Vol. IV, p. 308) and James Jackson (Vol. IV, 320), were unable to add anything to their defense. There was no showing at the time, and there is no showing now, that there is in existence any person who can add anything to the defense of the petitioner. The Trial Court's refusal to continue the trial indefinitely, to indulge the petitioner's hope that some elusive witness might some day be found, did not deprive the petitioner of any constitutional or statutory right.

IX

The Trial Court Did Not Err in Severing Jesse Ford and Trying Him Separately From the Petitioner.

No prejudice has been shown from this action of the Trial Court.

X-XI

The Court Did Not Err in Refusing to Declare a Mistrial When the Jury Returned a Verdict Finding the Petitioner and His Co-Defendant Guilty of First-Degree Murder and Sentencing Them to Imprisonment for Not Less Than Thirty (30) Years and One (1) Day, Nor More Than Sixty (60) Years on Each Count, and the Court Did Not Err, in Instructing the Jury to Reconsider Its Verdict, in Giving the Jury Examples of Acceptable Sentences Which Could Be Imposed.

These grounds allege constitutional error in the Trial Court's handling of the jury's erroneous sentence. The jury first announced that it had found the petitioner and his co-defendant guilty of first-degree murder, and that it had set a sentence of not less than thirty (30) years and one day nor more than sixty (60) years upon each of the counts. This sentence was inconsistent with the verdict: the sentence was in "indeterminate" form, which is required for sentence for some crimes by T.C.A. § 40-2707. That statute applies only to offense for which punishment must be set "within minimum and maximum terms." The punishment prescribed for conviction of first-degree murder, however, is not in this form, because there is no maximum term set by the Act. Therefore, T.C.A. § 40-2707 does not apply where a conviction is for first-degree murder.[10] When the jury announced that it had found the defendant guilty of first-degree murder, yet expressed its sentence in indeterminate form, the Trial Judge therefore had to send the jury back for reconsideration of the punishment. After reconsidering the matter, the jury returned its sentence in the correct form, and it was properly accepted by the Trial Court. This is no ground for Habeas Corpus relief; the practice, which has been approved

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[10] *Miller v. State*, 520 S.W.2d 729 (Tenn. 1975).

by the appellate courts of Tennessee,[11] is a reasonable method of meeting such a problem. The jury had reached a verdict on the guilt of the defendant, and there was no reason to think that that verdict would change just because the sentence would have to be changed; if the jury had felt that it would have said so at the announcement of the second sentence.

Summary

The petitioner has shown no deprivation of constitutional or statutory right which would entitle him to federal Habeas Corpus relief. The respondent respectfully suggests that the Record of the petitioner's trial is sufficient for the determination of all matters raised in this Petition, and that no evidentiary hearing will be required in this cause.

WHEREFORE, PREMISES CONSIDERED, THE RESPONDENT PRAYS THAT THIS ACTION BE DISMISSED.

Respectfully submitted,

/s/ TOM JENNINGS
Assistant Attorney General
414 Supreme Court Building
Nashville, Tennessee 37219
(615) 741-2250

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11 *Jenkins v. State*, 509 S.W.2d 240 (Tenn. Crim. App. 1974).

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell, Petitioner,
v.
Jim Rose, Warden, Respondent. } Civil C-75-222

and

James Nichols, Jr., Petitioner,
v.
Jim Rose, Warden, Respondent. } Civil C-75-265

ORDER OF REFERENCE TO MAGISTRATE

(Filed August 6, 1975)

UPON CONSIDERATION, it is ORDERED that the captioned causes be referred to the Magistrate for a study, report and recommendation.

ENTER this 6th day of August, 1975.

/s/ BAILEY BROWN
CHIEF JUDGE

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell,	Petitioner,	Civil Action C-75-222
vs.		
Jim Rose, Warden,	Respondent,	
and		
James Nichols, Jr.,	Petitioner,	Civil Action C-75-265
vs.		
Jim Rose, Warden.		

REPORT ON REFERENCE

(Filed Jan. 28, 1976)

The petitioners in this habeas corpus case were convicted of a double murder in the Circuit Court of Tipton County, Tennessee and each given two consecutively sixty-year terms in the penitentiary. They appealed their convictions to the Tennessee Court of Criminal Appeals, which affirmed. The Tennessee Supreme Court denied certiorari. The petitioners make the same claims here that they made in the Tennessee Court of Criminal Appeals. Most of these claims are not properly cognizable in a federal habeas corpus suit, but I will nevertheless discuss each one, at least briefly.

Prior to the trial the petitioner filed a plea in abatement which, among other things, asserted that

> [t]he array of the grand jury of Tipton County was not selected, drawn or summoned in accordance with the law and is not representative of the community from which it was impanelled because of systematic exclusion of Negroe's [sic], other minority's [sic] and people of lower income, expecially in regards to the position of the foremen of said grand jury. [Page 21 Technical Record.]

A hearing was held on this issue. Mr. Frank McBride, Sr. was called as a witness by the petitioners. (Beginning page 71, Vol. I.) Mr. McBride testified that, ten or twelve years ago, he served as foreman of the Tipton County Grand Jury for five or six years and "then about two or three times since then, just for one session of court." He testified that he had never known of a black acting as foreman of the grand jury. To his knowledge the presiding judge selected the grand jury foreman. He testified that it was his function as foreman to guide the proceedings and move them along.

Mr. Peyton J. Smith (whose testimony begins at page 74, Vol. I) testified that he served as foreman of the Tipton County Grand Jury for several years. He said that he was foreman for several years in the 1950's but had to resign for health reasons. He had, however, served several times since then when the regular foreman was ill. He did not know of any black ever having served as foreman. Mr. Smith served as foreman during the November, 1972 term, when the petitioners were indicted. He explained that he was chosen as foreman for the November, 1972 term in the following manner:

> Q. How were you chosen at the November term of Court? Who chose you to be foreman of the Grand Jury?
>
> A. The foreman who had been serving on a permanent basis at that time could not be here and I was asked to come and appear before this Court and the Judge asked me to serve.

Q. Who asked you to appear?

A. Mr. Naifeh, who was the foreman the Term before.

Q. You appeared before His Honor here?

A. Yes, sir.

Q. And His Honor commissioned you or appointed you as foreman of the Grand Jury for the November term?

A. Yes, sir.

Q. Was that in writing or was that just oral?

A. Oral. [Pg. 76, Vol. I.]

Mr. Smith testified that it was his practice while serving as foreman to question the witnesses first to get basic information to the attention of the members of the grand jury and then, after each witness has been examined, to ask other grand jurors if they wished to ask any further questions.

It is not entirely clear from the transcript whether Mr. Smith was chosen as a member of the grand jury panel and then asked to serve as foreman when the regular foreman became ill or whether he was simply appointed as foreman. This should be developed at an evidentiary hearing, as it is most important in light of the **Hale** case, which I shall discuss below.

Mr. Jimmy Naifeh testified (Pg. 81, *et seq.*, Vol. I) that he had been serving as foreman of the Tipton County Grand Jury for approximately two years and that he had never known there to be a black foreman.

Title 40, § 1506 of the Tennessee Code Annotated provides, in the following language, that the judge of the court having jurisdiction shall appoint foremen of grand juries:

> Judges having criminal jurisdiction in any county are authorized, and required to appoint the foremen of the grand juries in the counties of their respective jurisdiction; and said foremen shall hold office and exercise their powers

> for a term of two (2) years from appointment, unless for good cause, in the discretion of the presiding judge, he may be removed, relieved or excused from office at any time. Said foreman shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof.

T.C.A. 40-1706 provides that an indictment cannot be found without the concurrence of "at least twelve grand jurors." Since the grand jury foreman, under 40-1506, sits as the thirteenth member of the grand jury, his vote can be the twelfth in returning an indictment. T.C.A. 40-1507 provides that every person appointed as a foreman of a grand jury shall be at least twenty-five years of age, be a good and lawful man and possess all the qualifications of a juror. The statutory duties of grand juries foremen are set out in T.C.A. 40-1510. They should assist and cooperate with the District Attorney and, out of term, advise the District Attorney with respect to all violations and provide him names of witnesses which he may summon before the grand jury in the next term. T.C.A. 40-1513 (supplement) provides that the grand jury foreman shall receive compensation in the amount of $10.00 per day for each day the grand jury of which he is foreman is actually in session.

The Tennessee statutory scheme for the selection of grand jury foremen is not typical. The typical statute provides for the appointment by the court of a grand jury foreman from the panel already chosen to serve as the grand jury. See for instance, Arizona Criminal Rule 90; Delaware Superior Court Criminal Rule 6(c); Florida Code 905.08; Idaho Code 19-1010; Illinois Code 78-16; Indiana Statutes 9-88; Kentucky Revised Statutes 5.04; New York Penal Code 190.20; Arkansas Statutes Annotated 43.903; Mississippi Code § 1780. Other states provide for the election of the foremen by the grand jury itself. See, for instance, Massachusetts General Law Annotated 277-677. But the Tennessee statute allows the judge to appoint

a foreman from the general population in addition to the regular grand jury of twelve.

The United States Supreme Court in *Whitus v. Georgia*, 385 U.S. 545 (1967), pointed out that:

> For over four-score years it has been federal statutory law, 18 Stat. 336 (1875) 18 U.S.C. 243, and the law of this court as applied to the states through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based upon an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race. *Strauder West Virginia*, 100 U.S. 303 (1880); See also *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939).

The question of discrimination in the selection of a grand jury foreman has been previously raised in this court in the case of *Hale v. Henderson*, 336 F.Supp. 512, 349 F.Supp. 567, 400 F.2d 655, and 485 F.2d 266. In initially finding that the petitioner in *Hale* was entitled to an evidentiary hearing concerning the alleged exclusion of Negroes from the post of grand jury foremen, this court made the following observation:

> We do not understand why lack of systematic exclusion with respect to venires from which grand juries are drawn is an answer to petitioner's claim. As has been stated, grand jury foremen are appointed from the public at large, not from the venire; and even if they were appointed from the venire, it would still be possible systematically to exclude Negroes from appointment. If the court (state) means to say that, if the twelve members of the grand jury other than the foreman were selected without systematic exclusion of Negroes, it would be constitutionally immaterial if Negroes were systematically excluded from the position of foremen, we cannot agree. We cannot agree because *Whitus v. Georgia*, supra, does not indicate that a grand jury that is twelve-thirteenths constitutional can

> render constitutionally valid indictments. [336 F.Supp. 516].

An evidentiary hearing was held on this issue by Judge Mac Swinford, who heard the matter by special assignment. At the hearing it came out that the regular grand jury foreman who had been appointed pursuant to statute by the Cirminal Court Judge did not in fact serve as the foreman of the grand jury which indicted Mr. Hale. Therefore Judge Swinford concluded the following:

> Notwithstanding the petitioner's argument that grand jury foremen have been arbitrarily appointed and that over a period of history all grand jury foremen so appointed have been white, it appears that the particular grand jury indicting the petitioner was composed wholly of men selected from the venire. The grand jury indicting the petitioner was not chaired by the regular foreman, but by the foreman pro tempore, who was chosen from a body of grand jurors which was selected from the venire. There has been no evidence produced, nor has it been argued that the venire was discriminatorily constituted. The court must conclude that the venire was selected in a manner that did not systematically exclude blacks. [349 F.Supp. 568.]
>
> • • • • • • • •
>
> Admittedly the court has left unanswered the question of whether a voting member of the grand jury may be selected by a process that does not protect against the systematic exclusion of racial groups. *Whitus* would seem to proscribe the deliberate exclusions of blacks from any voting position on the grand jury, but here it is clear that blacks were not systematically excluded from any of the thirteen voting positions of the grand jury that indicted the petitioner. [349 F.Supp. 569.]

The Sixth Circuit Court of Appeals affirmed Judge Swinford's holding. 485 F.2d 266.

It appears that the petitioners in the instant case have made out a *prima facie* case of systematic exclusion of Negroes from the post of grand jury foremen. See *Anderson v. Johnson*, 371 F.2d 84 (6th Cir. 1966); Note, 33 L.Ed. 2d 783; *Coleman v. Alabama*, 389 U.S. 22 (1967). No rebuttal evidence was submitted on the question. Indeed, it would have been awkward for any to have been tendered, since the Circuit Judge who appointed the foreman, whose acts were impliedly alleged to have been discriminatory, was presiding at the hearing on the motion.

I therefore recommend that the court hold an evidentiary hearing on the question of discrimination in the selection of a grand jury foreman.[1] The hearing can develop, among other things, whether Mr. Smith, who served as foreman on the grand jury that indicted the petitioners, was in fact selected from a venire which in turn had been chosen in a proper manner.

The petitioners also allege that there was discrimination in the selection of the jury venire.[2] There was a hearing in the trial court on this issue. (Page 54, *et seq.*) The evidence revealed that the jury panels were drawn by a child at random from a box which was kept sealed in the clerk's office. The names in the box were chosen by the jury commissioners going through a telephone directory and picking out people they knew, either personally or by reputation. The commissioners who testified said that they were aware of the need to include blacks on juries and that in fact blacks had served on both grand and petit juries in Tipton County. It was developed that the grand jury that indicted the petitioners contained one black, a lady named Mary Ann Buford. Ms. Buford testified (page 86, *et seq.*) that she served on the grand jury that indicted the petitioners

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[2] Mr. Mitchell states under Section twelve of his petition that there was racial discrimination in the selection of the "jury commissioners," but it is clear from subsequent statements that he is actually making the same complaint as Mr. Nichols, that is that the venire was improperly selected by the commissioners.

and that there was no discussion of the race of the petitioners and no hostility expressed toward them.

The evidence concerning the racial makeup of past juries of Tipton County, the method of selecting jurors, and the inclusion of blacks on juries is somewhat sketchy in the record we have. I would, therefore, recommend that the court permit the petitioners to develop additional evidence on this issue at an evidentiary hearing if they wish to do so in addition to pursuing their claim of discrimination in selecting the foreman.

The petitioners claim that there was no evidence to support the verdict of guilty against them and that the evidence preponderated against the verdict. This is not a claim properly made in a federal habeas corpus suit. Before federal habeas corpus relief could be granted there would have to be an almost complete lack of evidence. *Casias v. Patterson*, 398 F.2d 486, cert. den. 393 U.S. 1108. *Thompson v. City of Louisville*, 362 U.S. 199; *Martinez v. Patterson*, 371 F.2d 815. Anyway, there is an abundance of evidence to support the verdict. A host of eye witnesses unequivocally testified that it was the petitioners who committed the slayings they were charged with.

The petitioners challenge the legality of two searches which produced an incriminating 38 caliber pistol and sawed-off shotgun. On a tip from an informant, officers of the Memphis Police Department went to 661 St. Paul in Memphis on October 28, 1972 where they had been told the defendant Nichols was located. When they entered the apartment on St. Paul they found Mitchell and Nichols and a number of other people, all of whom they arrested. They knocked onn the door of the apartment and were admitted by someone other than the defendants. After entering the apartment one of the officers recognized the defendant Nichols, saw a gun in his hand and heard a noise as though some heavy object had hit the floor. (Page 177.) Later, a police officer asked the owner of the apartment, Antionette Gilchrist, for permission to search the apartment,

which she gave in writing. The .38 revolver was then found in a closet where a hot water heater was located. (Page 178.) In the home of Eddie Mae and Mildred Jones at 1054 North Claybrook a police officer later found a sawed-off 12-gauge shotgun, a box of cartridges and some blood clothing. (Pg. 182.) Before searching they obtained a written consent to search from Eddie Mae and Mildred Jones.

The petitioners do not claim any interest in the premises searched. Indeed, they were not even present when the search was made that produced the shotgun, cartridges and blood clothing. They therefore have no standing to challenge these searches even if they were illegal, which is doubtful in view of the consents. *United States v. Hearn and Taylor*, 496 F.2d 236 (6th Cir. 1974).

The petitioners were indicted for killing both Claudie Green and William A. Nabors. They were both tried on these two indictments at the same time. Their attorneys moved, prior to the trial, that they not be tried for both these murders at the same time. The court denied that request, and they claim here that that was error.

Both Claudie Greer and William A. Nabors were killed during the same robbery by, according to the evidence, these petitioners. Whether these charges were tried together or separately was a question of state law, within the discretion of the trial judge. This court cannot pass on purely state law issues unless they involve some violation of a federally protected constitutional right. *Roddy v. Black*, 516 F.2d 1380 (1975). Furthermore, it does not appear that the action of the trial judge in trying the two charges together was in any way amiss.

The petitioners were jointly indicted for the two murders on October 28, 1972. On November 16, 1972 the Circuit Judge entered an order appointing John Proctor and Wilbur Cash to jointly represent both the petitioners, James Nichols,

Jr. and James Mitchell. Counsel made a motion prior to the trial for the state to divulge any statements made against the interests of the defendants. The prosecuting attorney announced, however, with regard to confessions and statements, that "[t]he state has none, so we can just get that much of it out of the way at this time." (Pg. 6, Vol. I.) Later, the District Attorney announced that he had learned of a statement made by the petitioner, Mitchell, to officers of the Memphis Police Department. He moved that the names of the officers who took the statements be included on the list of witnesses on the indictment and offered to make a copy of the statement and a cassette recording of it available to defense counsel. (Pg. 98.) Counsel for petitioners made a motion for a severance, which was denied.

Later in the trial Lt. L. M. Rose of the Shelby County Sheriff's Office testified (beginning at page 303) that on November 2, 1972 the petitioner James Mitchell called him and Inspector Dan Jones to the security unit of the John Gaston Hospital to give a statement. Lt. Rose said that Mr. Mitchell was advised of his constitutional rights and then gave an incriminating statement about the incident he was being tried for and certain other offenses. The statement had been reduced to writing, but it was generally conceded (outside the presenc of the jury) that Mitchell's statement could not be read into the record without implicating Nichols. (Pg. 301.) Lt. Rose, therefore, gave a narrative summary of a statement that involved only Mitchell. He did not refer to Nichols and, in my opinion, did not give his narrative in such a way that it might, even inferentially, implicate Nichols. Among other things, he said that Mitchell said that he, Mitchell, went to his car at Sonny Man's, got his sawed-off shotgun, went back in the place and fired twice. On cross-examination, however, Mr. Cash asked the following questions which produced the following answers:

> Q. I believe you have stated that Mitchell told you that he had a sawed off shotgun?

A. Yes, sir.

Q. So, I'm not going to call any names in this, but, "What kind of gun did blank have?" "Blank had a shotgun." "What kind of shotgun?" "Sawed-off shotgun." "You don't know what gauge that was?" "Twelve gauge." Now, this is a statement that's supposed to have been made from that tape and you have it right here in the tape. I call your attention to this and ask you if this isn't some other name here, other than Mitchell's?

A. Mr. Cash, you're now involved in something else. You need to go deeper in that statement. [Pg. 306 *et seq.*]

The court then, at the request of the prosecuting attorney, gave an explanation to the jury of the legal reasons for not admitting the whole statement into evidence.

Although Lt. Rose's initial narrative did not implicate Nichols, the cross-examination by Mr. Cash did. Not only did it implicate Nichols it inferred that it was he who had, and used, the sawed-off shotgun, which the other evidence indicates was not the case. Counsel for Mitchell, of course, had a right and obligation to bring out any inconsistencies between the narrative given by Lt. Rose and the actual statement. There was no one to object to this on behalf of Mr. Nichols since both attorneys were representing both defendants.

There appears, therefore, to have been a violation of the rule laid down in *Bruton v. United States*, 391 U.S. 123 (1968). I recommend that the court include this issue in any evidentiary hearing. The court should also consider whether this error, in the context of the other evidence, would be harmless.[3]

Prior to the trial the petitioners filed a motion claiming that "serious doubts" had arisen "in the minds of petitioners as to

[3] This could only be Nichol's issue, although Mitchell also tries to raise it.

the mental stability of the defendants James Nichols, Jr. and James Mitchell." They alleged in their petition that they were then incapable of properly defending the charges against them due to their mental condition, and asked that they be admitted to some appropriate state institution for a period not exceeding thirty days for observation and a report to the court pursuant to Tennessee Code Annotated § 33-701. This motion was filed on March 16, 1973. (Page 44 Technical Record.) The motion was heard on March 19, 1973 (pg. 2 *et seq.*). The court conducted a full hearing, after which it denied the motion for psychiatric examinations, and by inference held that the petitioners were capable of assisting in their defense. The petitioners themselves testified at the hearing. From reading the transcript on this motion, I find nothing to indicate that the petitioners' constitutional rights were violated by the court's not granting a mental examination. Indeed, I find nothing to indicate that the judge erred in not granting such an examination.

The petitioners complain that they were denied their constitutional rights because the trial court refused to grant a continuance. It appeared as the trial started that two witnesses who had been subpoened, Chester Taylor and Leo Knox, were not present. After a hearing concerning what these witnesses would provide—allegedly an alibi—the court recessed the trial for a day and gave instructions to the Sheriff to make every effort to locate these witnesses. When the trial resumed Taylor and Knox were present, but the petitioners had decided they would not use them. Instead, they wanted some additional witnesses subpoened, whose names had allegedly been supplied them by Tay lor and Knox. After a hearing (pg. 15, *et seq.*) the court declined to further continue the trial. I do not believe he abused his discretion in doing so, and certainly did not deny any constitutional rights of the petitioners in doing so.

The petitioners complain of the court granting a severance for their co-defendant, Jesse E. Ford. The District Attorney

asked for a severance as to Mr. Ford, saying that he had intended to use him as a witness. The court granted the severance, although the prosecutor decided not to use Mr. Ford. It is not suggested in what manner the granting of a severance as to Jesse Ford might have infringed the petitioners' rights guaranteed by the United States Constitution. I do not believe that it did.

The jury returned with a verdict which was, under Tennessee Law, in an improper form. The following is what the Tennessee Code of Criminal Appeals said on this question:

> The tenth and eleventh assignments of error attack the verdict as returned by the jury. Upon returning from their deliberations, the jury announced that they had found plaintiffs-in-error guilty of murder in the first degree as charged in the indictments, and fixed their punishment "at not less than 30 years and 1 day and not more than 60 years for each count; Nos. 846 and 847". The trial court recognized that this verdict was in improper form, since the indeterminate sentence law does not apply to the capital offenses of murder and rape. *Franks v. State*, 187 Tenn. 174, 213 S.W. 2d 195.
>
> Plaintiffs-in-error maintain that the trial court should have declared a mistrial when the jury returned the above verdict, and should not have given them further instructions with examples as to what form the verdict should be. We cannot agree. As was said in *State ex rel. Myers v. Brown*, 209 Tenn. 141, 351 S.W.2d 385. "The Court has the power, and it is his duty, when a jury offers to return an informal or insufficient verdict, to send them back to the jury room with directions to amend it and put it in proper form". In light of the above, the trial court acted properly and the final two assignments of error are overruled.

This is an issue of state law which was not cognizable in a federal habeas corpus action.

I recommend that a Writ of Habeas Corpus Ad Prosequendum be issued to the United States Marshal for this district, the United States Marshal for the Middle District of Tennessee, and to the Warden of the Tennessee State Penitentiary to have the petitioners transported to the Shelby County Jail and lodged there pending the proceedings on their habeas corpus applications in this court. I further recommend that separate counsel be appointed for the defendants because of the *Bruton* question.

I further recommend that the court hold an evidentiary hearing on the jury and jury foreman selection issues and the *Bruton* question. I further recommend that the petitioners' application to this court be dismissed as to all other claims.

Submitted this, the 28th, day of January, 1976.

/s/ AARON BROWN, JR.
UNITED STATES MAGISTRATE

James E. Mitchell,
Petitioner,
v.
Jim Rose, Warden,
Respondent,
} Civil C-75-222

and

James Nichols, Jr.,
Petitioner,
v.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

ORDER FOR FURTHER RESPONSE

This cause is again before this court following a reference to the magistrate who filed a report on January 28, 1976.

This court agrees with the magistrate that all claims of petitioners other than their claims having to do with racial discrimination in the selection of the grand jury, including the foreman of the grand jury, and the claim of petitioner Nichols based on *Bruton v. United States*, 391 U.S. 123 (1968), should be dismissed. It is so ORDERED.

The court disagrees with the magistrate to the extent that he recommends that a hearing be held with respect to racial discrimination in the constitution of the grand jury which indicted these petitioners. We are of the opinion, having studied the record made prior to the trial, that the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury, was the correct decision on the record before him.

We do, however, agree with the magistrate that, based upon the same inquiry, it would appear that a *prima facie* case has been made with respect to discrimination in the selection of the foreman of the grand jury. See *Hale v. Henderson*, 336 F.Supp. 512, 349 F.Supp. 567, 485 F.2d 266. The record does not indicate any evidence introduced to rebut such *prima facie* case.

We further agree with the magistrate that there appears to nave been a violation of the *Bruton*, supra, rule with respect to the petitioner Nichols in connection with the examination of the officer who testified concerning the statement made by petitioner Mitchell.

Accordingly, it is ORDERED that respondent further answer these petitions directed to the question concerning discrimination in selection of foremen of the grand jury and in connection with the claimed violation of the *Bruton* rule and, good cause appearing, twenty-three (23) days are allowed in which to answer.

ENTER this 17th day of February, 1976.

/s/ BAILEY BROWN
CHIEF JUDGE

In the United States District Court for the
Western District of Tennessee
Western Division

James Nichols, Jr.
vs.
Jim H. Rose, Warden.
} Civil No. C-75-265.

FURTHER RESPONSE

Now comes the respondent, by and through the Attorney General of Tennessee, and makes further response to the Order

of this Court to show cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. In that regard, the most recent Order of this Court in this matter dismissed all claims by petitioner Nichols and petitioner Mitchell (C-75-222) except the claim of petitioner Nichols relative to a *Bruton* violation and the claims of both petitioners relative to the question concerning discrimination in the selection of foremen of the grand jury by which they were indicted. In this response, the respondent will address only the petitioner Nichols' claim relative to a *Bruton* violation. The claim of this petitioner and petitioner Mitchell regarding racial discrimination in the selection of the foremen of their grand jury will be addressed in a separate response.

I

As reflected by this Court's Order of February 17, 1976 and the Magistrate's reference report, there appears to have occurred a violation of the *Bruton* rule with respect to the petitioner Nichols. Apparently, any violation of the *Bruton* rule occurred during the cross-examination of Lt. Rose by the attorney representing both Mitchell and Nichols. Assuming arguendo, that the *Bruton* rule was violated during this cross-examination the respondent respectfully submits that such violation was clearly harmless error in view of the other evidence against petitioner Nichols and in light of the United States Supreme Court decision in *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 (1973).

II

In this regard, the respondent would respectfully show to this Court that an independent examination of the record as a whole would reveal that any *Bruton* error was harmless. The testimony erroneously admitted was merely cumulative of the other overwhelming and largely uncontroverted evidence properly before the jury. This other evidence included an eyewitness identification of the petitioner Nichols by more than one (1) witness. (See State Record, p. 66, 68, 70, 92, 94, 96).

III

In *Brown* the United States Supreme Court rejected the notion that a *Bruton* error can never be harmless. It should be noted in *Brown* the prosecution introduced on direct examination substantial portions of each defendant's confessions which implicated the other. In the instant case, any *Bruton* violation occurred on cross-examination and was not directly admitted through the State's direct proof. It should also be noted that, if a *Bruton* violation does exist, the instant violation is clearly less significant than the *Bruton* violation which was declared harmless error in *Brown*.

WHEREFORE, for the above-stated reasons, the respondent respectfully prays that the claim of petitioner Nichols with regard to an alleged *Bruton* violation be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

Certificate of Service

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James Nichols, Jr. No. 58054, Tennessee State Penitentiary, Nashville, Tennessee, this 11 day of March, 1976.

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-222

James Nichols, Jr.
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

FURTHER RESPONSE

Now comes the respondent, by and through the Attorney General of Tennessee, and makes further response to the Order of this Court to Show Cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. In that regard, the most recent Order of this Court in this matter dismissed all claims by petitioner Nichols and petitioner Mitchell except for the claim of petitioner Nichols relative to a *Bruton* violation and the claims of both petitioners relative to the question concerning racial discrimination in the selection of the foreman of the Grand Jury by which they were indicted. In a previously filed further response, the respondent addressed the petitioner Nichols' claim relative to a *Bruton* violation. Therefore, this Response addresses only the question concerning racial discrimination in the selection of the foreman of the Grand Jury by which both petitioners were indicted.

(1) As reflected by the Affidavit attached hereto, the State record previously filed, and the Magistrate's reference report, the following facts may be assumed concerning the foreman of the Grand Jury which indicted the petitioners and his method of selection:

(a) The foreman of the Grand Jury was Peyton J. Smith.

(b) Mr. Smith was not the regular foreman of the Tipton County Grand Jury but was selected by the trial judge to serve as foreman when the regular foreman, Mr. Naifeh, was unable to serve.

(c) The only reason for his selection as acting foreman, according to Mr. Smith, was his previous experience as foreman of the Tipton County Grand Jury.

(d) Mr. Smith did not vote to indict the petitioners since the indictment was returned on the vote of the other twelve (12) grand jurors.

(e) There is no evidence anywhere in the record of any irregularities in the selection of the other twelve (12) grand jurors.

(f) Mr. Smith's only role in the indictment of the petitioners was the simple and routine function performed by the foreman of a grand jury.

(g) Although twenty (20) or more witnesses were prepared to testify before the Grand Jury in this case, only one (1) witness testified and that witness was the police officer who had obtained confessions from the petitioners. The other twelve (12) grand juriors voted to indict the petitioners after hearing the testimony of this one (1) witness.

(2) The respondent has been unable at this point to ascertain whether Peyton J. Smith was a member of the regular Grand Jury venire when he was appointed to act as foreman. Inquiries

have been made to the trial judge and to the Clerk of Court in an attempt to ascertain whether Mr. Smith was a regular member of the Grand Jury venire or was simply selected based upon his past experience. The results of these inquiries will be forwarded to the Court as soon as the information is received. As this Court knows, if Mr. Smith was a member of the regular Grand Jury venire then petitioners' claims should be dismissed according to the authority of *Hale v. Henderson*, 336 F. Supp. 512, 349 F.Supp. 567, 400 F.2d 655, and 425 F.2d 266.

(3) The respondent further submits that the claims of petitioners should be dismissed based upon the facts now shown since the only role of Mr. Peyton J. Smith in the indictment returned against petitioners was to perform the supervisory functions of acting foreman. Mr. Smith did not vote for indictment and obviously the issue was never really in doubt since the twelve (12) regularly selected members voted for indictment after hearing only one (1) witness.

WHEREFORE, for the above-stated reasons, the respondent respectfully prays that the claims of the petitioners Nichols and Mitchell relative to the question concerning discrimination in the selection of the foreman of the Grand Jury by which they were indicted be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

Certificate of Service

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James E. Mitchell, No. 66684, Tennessee State Penitentiary, Nashville, Tennessee and Mr. James Nichols, Jr.,

No. 58054, Tennessee State Penitentiary, Nashville, Tennessee this 26 day of March, 1976.

/s/ MICHAEL E. TERRY
Assistant Attorney General

STATE OF TENNESSEE
COUNTY OF TIPTON

Being duly sworn, Peyton J. Smith states and makes oath that he was the acting foreman of the Tipton County Grand Jury which indicted James Nichols and James Mitchell for first-degree murder on November 6, 1972. Furthermore, the affiant states that to the best of his knowledge, belief, memory, and based upon a recent check of the records on file at the Tipton County Court house, the regular foreman of that Grand Jury, Mr. Naifeh, was unable to serve as foreman at the particular term which indicted the petitioners. At that term, the Judge appointed the affiant to serve as foreman since the affiant had previously served in that capacity some years prior. Furthermore, the affiant states that the only reason, to the best of his knowledge, for his selection as acting foreman was his prior experience as the foreman of previous grand juries. Furthermore, the affiant states that he is presently serving in the capacity of foreman of the Grand Jury of Tipton County. Furthermore, the affiant states that in all his years as foreman of the Grand Jury or acting foreman of the Grand Jury of Tipton County he has only once voted for indictment. In all other cases true bills have been returned based solely upon the vote of the other twelve (12) grand jurors. In this regard, the affiant states that he specifically remembers the case in which he voted for indictment and that case was not the case involving the petitioners Nichols and Mitchell. Finally, the affiant states that although some twenty (20) witnesses were called in the case involving the petitioners Nichols and Mitchell, the testimony of only one witness was heard, after

which all of the Grand Jurors indicated that they had heard sufficient testimony to establish probable cause and that they were ready to vote on the indictment.

/s/ PEYTON J. SMITH

Sworn and subscribed before me this 17th day of March, 1976.

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell, Petitioner, v. Jim Rose, Warden, Respondent,	}	C-75-222
and		
James Nichols, Jr., Petitioner, v. Jim Rose, Warden, Respondent.	}	C-75-265

ORDER

(Filed April 6, 1976)

This cause is before the court again following the order of the court requiring a further response and the further responses filed pursuant thereto.

In the further response, respondent concedes that there was a violation of the *Bruton* rule with respect to petitioner Nichols but contends that, in view of the weight of the evidence against Nichols, the error was harmless.

It is therefore ORDERED that this matter be again referred to the Magistrate for a report and recommendation, after consideration of the State trial court record, as to whether such *Bruton* error was harmless with respect to petitioner Nichols.

As to the issue concerning discrimination against blacks in selection of the foremen of the grand jury, the further response contains an affidavit by the foreman who states in substance that he did not vote on the indictment of petitioners and that, although some twenty witnesses had been called, the twelve regular grand jurors voted to indict them after hearing the first witness testify. The further response states that counsel for respondent has not yet been able to determine whether this foreman was a regular member of the grand jury venire when he was appointed to act as foreman, that inquiries have been made in that regard, and that the response will be supplemented as soon as such information is received.

It is ORDERED that the further response be supplemented by affidavit as to whether the foreman was a regular member of the venire within ten days.

It is so ORDERED.

ENTER this 6 day of April, 1976.

/s/ BAILEY BROWN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

James E. Mitchell,
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-222

James Nichols, Jr.,
Petitioner,
vs.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

FURTHER RESPONSE

Now comes the respondent, by and through the Attorney General of Tennessee, and makes further response to the latest Order of this Court to Show Cause why the Writ of Habeas Corpus and the relief prayed for in this cause should not be granted. In that regard, the most recent Order of this Court in this matter ordered further response as to whether the Grand Jury Foreman was a regular member of the venire. In this regard, the respondent states as follows:

(1) The Foreman of the Grand Jury which indicted the petitioners was not a member of the regular venire.

(2) The Grand Jury which indicted the petitioners consisted of a black individual, Mary Ann Buford.

(3) In support of these facts the respondent herewith submits a letter from respondent's counsel to H. M. Patrick, Clerk of

the Circuit Court of Tipton County dated March 25, 1976; the response of H. M. Patrick dated April 1, 1976; and a certified copy of the minutes of the Circuit Court of Tipton County from November 6, 1972 which shows the composition of the Grand Jury and the Grand Jury venire.

(4) Inquiry has been directed to the trial judge in an effort to ascertain his considerations in selecting Peyton J. Smith as Foreman of this particular grand jury. That information will be provided the Court as soon as it is available.

(5) Based upon the information already before the Court, respondent concludes that the following facts have been shown:

(a) The Foreman of the Grand Jury was not a member of the Grand Jury Venire but was selected by the trial judge to serve as foreman when the regular foreman was unable to serve.

(b) The Foreman of the Grand Jury did not vote to indict the petitioners and the indictment was returned on the vote of the other twelve (12) grand jurors.

(c) Only one (1) witness actually testified and that was a police officer who obtained confessions from the petitioners. The other twelve (12) grand jurors voted to indict the petitioners after hearing the testimony of this one (1) witness.

(d) Among those grand jurors voting to indict the petitioners was a black lady, Mary Ann Buford.

(e) Ms. Buford has previously testified in state court that there was no indication of any racial prejudice or discrimination denoted in any way relative to the indictments of the two (2) petitioners. (See State Record, p. 90).

WHEREFORE, for the above stated reasons, the respondent respectfully submits that the indictments in this case were re-

turned without any hint of racial prejudice or discrimination in any form. For the sake of argument, it may be said that the system by which the Foreman of the Grand Jury in Tipton County in November of 1972 was selected was a system not completely immune from racial discrimination. Simply stated, it may have been possible to racially discriminate in the selection of a Grand Jury Foreman in Tipton County in November of 1972. However, to afford these petitioners any relief based upon a possibility which is not supported by any fact or reasonable inference would be to ignore the realities of this particular case. For these reasons, the respondent respectfully prays that the claim of the petitioners Nichols and Mitchell relative to the question concerning discrimination in the selection of the Foreman of the Grand Jury by which they were indicted be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

Certificate of Service

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James E. Mitchell, No. 66684 and Mr. James Nichols, Jr., No. 58054, Tennessee State Penitentiary, Nashville, Tennessee, this 12 day of April, 1976.

/s/ MICHAEL E. TERRY
Assistant Attorney General

In the United States District Court for the
Western District of Tennessee

James E. Mitchell, Petitioner,
vs.
Jim Rose, Warden, Respondent. } Civil C-75-222

James Nichols, Jr., Petitioner,
vs.
Jim Rose, Warden, Respondent. } Civil C-75-265

FURTHER RESPONSE

Now comes the respondent, by and through the Attorney General of Tennessee, for the purpose of further responding to this Court's Order to show cause why the application for a Writ of Habeas Corpus should not be granted. In this regard, the respondent would respectfully show:

(1) As reflected by the attached affidavit of the trial judge, Herman L. Reviere, Mr. Peyton J. Smith was selected to serve as foreman of the Grand Jury which indicted the petitioners because he was willing and because he had experience and had shown his ability to do that job in the past. Apparently, Mr. Smith's race was not a consideration in his selection to serve as Foreman of this particular Grand Jury.

WHEREFORE, based upon all of the evidence before this Court, respondent respectfully prays that the application for a Writ of Habeas Corpus can be denied.

Respectfully submitted,

/s/ MICHAEL E. TERRY
Assistant Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

Certificate of Service

I hereby certify that I have mailed a copy of the foregoing Response to Mr. James E. Mitchell, No. 66684, and Mr. James Nichols, Jr., No. 58054, Tennessee State Penitentiary, Nashville, Tennessee, this 12 day of April, 1976.

/s/ MICHAEL E. TERRY
Assistant Attorney General

TO WHOM IT MAY CONCERN:

I, Herman L. Reviere, Judge of the Circuit Court of Tipton County, Tennessee, make the following statement under oath at the request of the Attorney General of the State of Tennessee.

I was the Circuit Court Judge for the Criminal Court of Tipton County, Tennessee at the November Term, 1972. Mr. Jimmy Naifeh was the regular foreman of the Grand Jury but was unable to serve because he was going to be out of the County at the November 1972 term. Mr. Peyton Smith had served for me as foremen on previous occasions due to the absence of the regular foreman and I asked him to serve at this time.

Also, Mr. Smith had served as regular Grand Jury Foreman for my predecessor in 1953 and 1954. Our records do not indicate that Mr. Smith was on the regular jury panel nor the grand jury panel in November 1972. We called Mr. Smith because he has been willing to act in the past and has experience and does a good job as such foreman.

In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foreman very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so.

Witness my signature this April 5, 1976.

/s/ HERMAN L. REVIERE
Circuit Judge 16th Judicial Circuit

Sworn to and subscribed to before me this April 5, 1976.

/s/ H. M. PATRICK
Circuit Court Clerk

In the United States District Court for the
Western District of Tennessee
Western Division

James Nichols, Jr., Petitioner,

vs.

Jim Rose, Warden, Respondent.

No. C-75-265

SECOND REPORT ON REFERENCE

(Filed Feb. 15, 1976)

This cause, and that of petitioner's co-defendant, James E. Mitchell, were previously referred to me for a report and recommendation. In my prior report I recommended that the court further consider the charge that there was racial discrimination in selecting the foreman of the grand jury that indicted the petitioners, and I also recommended that the court further consider the violation by the state trial court of the rule set out in *Bruton v. United States*, 391 U.S. 123 (1968). Subsequent to that report the court disposed of the issues concerning alleged racial discrimination in selection of the grand jury and its foremen, and the State of Tennessee conceded that there was a violation of the *Bruton* rule as to James Nichols, Jr. The only question remaining is whether or not that violation was harmless error. The court again referred this matter to me for a report and recommendation on that issue.

After his arrest, the petitioner's co-defendant, James Mitchell, was in the security unit of the John Gaston Hospital in Memphis, Tennessee. Lt. L. M. Rose of the Shelby County Sheriff's office testified that Mitchell called him and Inspector Dan Jones

to the security unit of John Gaston to give a statement on November 2, 1972. Lt. Rose testified that Mitchell was advised of his constitutional rights, after which he gave an incriminating statement about the robbery and murder in Tipton County, Tennessee, which he and the petitioner were charged with. When the state undertook to introduce this confession into the joint trial of the petitioner and Mitchell, the court concluded that it could not be read into the record without implicating the petitioner. But Lt. Rose was allowed to give a narrative summary of the statement omitting any reference to the petitioner and implicating only Mitchell. As I stated in my previous report, it appears that Lt. Rose was successful in his effort to narrate Mitchell's statements in such a way as to not implicate or suggest the participation of Nichols in the incident about which the statement was given. Lt. Rose's narration of Mitchell's statement begins at page 304 of the trial transcript.

Mr. Mitchell told Lt. Rose that he, Mitchell, went to Sonny Man's Club in Tipton County on October 28, 1972 and gambled there. He later left that place and went to another establishment, but then came back. He first went inside, and then went back out to his car where he got a sawed-off shotgun. He went back into Sonny Man's and started shooting after he heard a shot. He said that he shot twice, and may have killed someone, but he did not know for sure.

After Lt. Rose testified about Mr. Mitchell's statement, Mr. Cash, who had been appointed along with Mr. Proctor to represent both defendants, questioned Lt. Rose about the statement that Mr. Mitchell had given. He asked Lt. Rose whether Mitchell told him that he, Mitchell, had a sawed-off shotgun. When Rose said that he did, Mr. Cash began reading from the statement, leaving out the name of Nichols. The following questions of Lt. Rose produced the following answers:

Q. I believe you have stated that Mitchell told you that he had a sawed-off shotgun?

A. Yes sir.

Q. So, I'm not going to call any names in this, but "What kind of gun did blank have?" "Blank had the sawed-off shotgun" "What kind of shotgun?" "Sawed-off shotgun." "You don't know what gauge that was?" "Twelve gauge."

Now, this is a statement that's supposed to have been made from that tape and you have it right here in the tape. I call your attention to this and ask you if this isn't some other name here, other than Mitchell's?

A. Mr. Cash, you're now involved in something else. You need to go deeper in that statement. [P. 306, *et seq.*]

The part of the statement that Mr. Cash read indicated that it was Nichols who had the sawed-off shotgun, although the last response of Lt. Rose indicated that Mr. Cash had taken part of the statement out of context.

The court, at the request of the prosecuting attorney, gave an explanation to the jury as to why the statement could not be admitted. The judge then asked Mr. Cash if he wanted to "clear that up with the officer." He appears to have been referring to the confusion about who had the shotgun. Mr. Cash said he had no further questions. It is this cross-examination by Mr. Cash of Lt. Rose that caused the *Bruton* violation.

For the court to hold that a violation of *Bruton* was harmless in the context of a particular case, the court must be able to find that it was harmless beyond a reasonable doubt. The quantity of other evidence of guilt, in addition to the illegally admitted statement, is of critical importance in deciding if a *Bruton* violation is harmless. *Harrington v. California*, 395 U.S. 250 (1969).

Sonny Man's Cafe (known on October 28, 1972 as White's Cafe), was a drinking and gambling establishment in Tipton County, Tennessee. The premises were divided into a front and back room, the front room being used primarily for eating

and drinking and the back room being used for gambling. On October 28, 1972 this establishment was robbed by two black males. During the robbery two patrons, Claudie Greer and William Nabors, were shot and killed. Greer was shot with a .38 caliber pistol and Nabors was shot in the face with a single-barrel sawed-off shotgun. After the robbery and killing, the two black males fled.

R. G. Knoblin, a Memphis police officer testified (beginning at page 164) that he received a tip from a reliable confidential informant on October 29, 1972, that the parties responsible for the murders in Tipton County were at a certain address on St. Paul Street in Memphis. Mr. Knoblin then called Deputy Sheriff Lavelle of Tipton County and received some information from him about the robbery and shooting at Sonny Man's Cafe the day before. Officer Knoblin, several other Memphis police officers and officers from Tipton County met at the address the informant had supplied. They knocked on the door to the apartment and were admitted. Everyone in the apartment, including Nichols and Mitchell, were arrested and brought to police headquarters.

Lt. Tom Marshall of the Memphis Police Department testified (beginning at page 175) that he investigated the Sonny Man's robbery and killing on Sunday, October 29, 1972. Detective Knoblin told him about the conversation with the confidential informant, and later Mr. Lavelle, with some witnesses from Tipton County, came to his office and looked at some mug-shots. As a result of viewing those mug-shots the Tipton County witnesses positively identified photographs of James Nichols. Mr. Marshall then went with the other officers to 661 St. Paul where Nichols and Mitchell, together with other residents, were arrested. Upon knocking on the door of the apartment at 661 St. Paul, the officers were admitted by a woman. While standing at the door looking in Mr. Marshall identified Mr. Nichols from the photograph that had previously been identified. As he started in the door he noticed a gun in Nichol's right hand.

As he entered the door Nichols stepped into a hall and apparently dropped the gun to the floor. Later, Antoinette Gilchrist told Mr. Marshall that the apartment was hers and gave the officers a consent to search. Lt. Marshall then found a .38 caliber revolver on the floor in the hall inside a closet. This was near where he saw Nichols drop a gun. The gun was fully loaded with six rounds of .38 caliber ammunition. Antoinette Gilchrist was wearing a ring which she gave to the officers. Upon searching the apartment, ten twelve-gauge shotgun shells were taken from a lady's purse lying on the couch. Later, the officers searched a resident at 785 Watkins upon consent of the residents, Eddie Mae Jones and her mother, Mildred Jones. From that search the officers found a sawed-off twelve-gauge shotgun, a box of cartridges and some bloody clothing.

Deputy Sheriff Charles Lavelle testified (beginning at page 34) that he investigated the robbery and murder at Sonny Man's on October 28, 1972. When he arrived he found William A. Nabors and Claudie Greer dead on the floor in the back room. Nabors had been shot in the face with a shotgun and Greer had been shot in the stomach with a bullet. The next day Mr. Lavelle took some witnesses to Memphis to confer with officers of the Memphis Police Department. Those witnesses were June Buford and John Paul Bonner.

Robert Reeder assisted Callie White in the operation of Sonny Man's Cafe on October 28, 1972. He positively identified James Nichols as one of the men who robbed them that morning. He testified that Nichols came into the place bandishing a .38 caliber pistol and another pistol and announced a "stickup." When he came in he hit one Ed Allen over the head, knocking him to the floor. He made others in the front room lie down on the floor and, when someone would come in, he would kick them down and shoot over their heads. During the affray, Mr. Reeder heard shots from the back room, and saw James Nichols fire into the back room with his pistol. After the robbers left, Claudie Greer was found dead of a pistol shot

in the back room. Mr. Reeder's testimony begins at page 59 of the transcript.

Callie White testified (beginning at page 87) that she was the owner of Sonny Man's Cafe in Tipton County at the time of the robbery. Around 3:00 o'clock or 3:30 a.m. on Saturday morning, October 28, 1972, James Nichols, whom she identified from the witness stand, came in the front door of her establishment and announced a holdup. He then hit Ed Allen on the head with a pistol and fired a shot toward the back room. Mrs. White heard two other shots from the back room and later saw Mitchell come out out of that room. Nichols got some money and a billfold from Robert Reeder and departed. She testified that there was absolutely no doubt in her mind that the person with the pistol was James Nichols because, for one thing, he kissed her. She was equally positive that it was James Mitchell who came from the back room with a sawed-off shotgun.

Ed Allen testified that he was a customer in Sonny Man's Cafe on the night of the robbery. He identified James Nichols as the man who came in and hit him in the head and robbed the place.

Sheppard Pitchford was in the back room of Sonny Man's on the night of the robbery. He identified James Mitchell as the man who robbed the back room and shot William Nabors in the face with a shotgun. He also testified that Claudie Greer was shot while standing in the back room with his hands up and that, prior to Greer falling, he heard a shot come from the front room. Mr. Pitchford briefly saw the other man with the pistol, but could not identify him. He identified the ring that was taken from Antoinette Gilchrist as his ring which had been taken from him by James Mitchell.

Antoinette Gilchrist testified (beginning at page 188) that James Nichols and James Mitchell were at her house when the police officers arrived. She testified that she consented to the

search of her apartment and that the officers found a .38 caliber pistol, which James Nichols had brought with him. She also identified the ring belonging to Sheppard Pitchford as being a ring she obtained from James Nichols shortly before the officers arrived.

Paul Bonner testified (beginning at page 219) that he was in the front room of Sonny Man's on the night of the robbery. He identified James Nichols as the man who came into the place, hit Ed Allen over the head, robbed the establishment, and fired toward the back room.

June Buford (a male whose real name is "Van") was in Sonny Man's on the night of the robbery. He was in the front room when James Nichols, who he identified, came in, hit Ed Allen and robbed the place. Nichols had a pistol which he fired once or twice, but Mr. Buford did not know in which direction.

Dewitt Driver was in the back room of Sonny Man's when the robbery occurred. He testified (beginning at page 262) that James Mitchell came in and fired a shotgun at the ceiling and announced a holdup. Later, a pistol shot felled Claudie Greer. Then James Mitchell shot William Nabors with the shotgun.

Willie Owens was in the back room at the time of the robbery, and identified Jmes Mitchell as the individual with the shotgun who shot William Nabors. He testified that Claudie Greer was shot before Nabors was.

It is true that the testimony of Lt. Rose concerning Mitchell's statement indicated that Mitchell said Nichols, raher than he, had the shotgun. However, Lt. Rose's last statement indicated that there was some confusion about the matter or that the part of the statement Mr. Cash was reading had been taken out of context. All of the other evidence clearly establishes that it was Mitchell who had the shotgun and Nichols who had

the pistol. I do not see how this particular confusion could have significantly damaged Nichols's defense. If anything, the confusion would likely have inured to his benefit in view of all the other unmistakable identification of him as the individual with the pistol. The evidence against Nichols was truly overwhelming. I find, therefore, that the *Bruton* violation was harmless beyond a reasonable doubt.

Submitted this the 15th day of February, 1977.

/s/ AARON BROWN, JR.,
United States Magistrate

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell,
Petitioner
v.
Jim Rose, Warden,
Respondent,
} Civil C-75-222

and

James Nichols, Jr.,
Petitioner,
v.
Jim Rose, Warden,
Respondent.
} Civil C-75-265

MEMORANDUM AND ORDER

(Filed Feb. 17, 1977)

This cause is before the court following a further reference to the magistrate and receipt of a second report on reference

from the magistrate. The reference was for the single purpose of determining whether or not the violation of the *Bruton* rule with respect to petitioner Nichols was harmless beyond a reasonable doubt. The magistrate, after reviewing the evidence, concluded that the violation of the *Bruton* rule was harmless beyond such doubt.

This court, after consideration, is likewise of the opinion that the violation of the *Bruton* rule, considering the content of the violation of the rule, and considering the massive other evidence against this petitioner, was harmless beyond a reasonable doubt.

With respect to both petitioners, Mitchell and Nichols, the court is further of the opinion from the record that no racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The Clerk will therefore enter a final judgment dismissing these actions. It is so ORDERED.

ENTER this 17 day of February, 1977.

/s/ BAILEY BROWN
CHIEF JUDGE

United States District Court
for the
Western District of Tennessee
Western Division

Civil Action File No. C-75-265

James Nichols, Jr.
v.
Jim Rose, Warden

JUDGMENT
(Filed February 18, 1977)

This action came on for consideration before the Court, Honorable Bailey Brown, United States District Judge, presiding, and the issues having been duly * * * considered and a decision having been duly rendered, in favor of the defendant,

It is Ordered and Adjudged that this action be and is hereby dismissed.

Dated at Memphis, Tennessee, this 18th day of February, 1977.

/s/ John W. (Illegible)
Deputy Clerk of Court

United States District Court
Western District of Tennessee
Western Division

Civil Action File No. C-75-222

James E. Mitchell
vs.
Jim Rose, Warden

JUDGMENT
(Filed February 18, 1977)

This action came on for consideration before the Court, Honorable Bailey Brown, United States District Judge, presid-

ing, and the issues having been duly * * * considered and a decision having been duly rendered, in favor of the defendant,

It is Ordered and Adjudged that this action be and is hereby dismissed.

Dated at Memphis, Tennessee, this 18th day of February, 1977.

/s/ John W. (Illegible)
Deputy Clerk of Court

In the United States District Court
For the Western District of Tennessee
Western Division

James E. Mitchell,	Petitioner,	Civil C-75-222
v.		
Jim Rose Warden,	Respondent,	
and		
James Nichols, Jr.,	Petitioner,	Civil C-75-265
v.		
Jim Rose, Warden,	Respondent.	

ORDER DENYING MOTION FOR HEARING, ETC.

(Filed March 23, 1977)

Following our memorandum and order of February 17, 1977, in which we directed that a final judgment be entered for the

respondent, an earnest motion for hearing and/or amendment of judgment and/or reconsideration has been filed in behalf of petitioners by the University of Tennessee Legal Clinic. In this motion, supported by memorandum, it is contended that petitioners have made a prima facie case with respect to discrimination in the selection of the trial jury and, further, that petitioners have made a case of discrimination in the selection of the grand jury foreman.

With respect to the first contention, that is, the contention having to do with discrimination in the selection of the trial jury, it appears to the court that the instant motion raises this issue for the first time, and, as we read the assignments of error in the direct appeal of these convictions, there was no contention that such discrimination occurred with respect to the selection of the trial jury. Since the assignments of error in the direct appeal are the only basis for a showing of exhaustion of state remedies here, it is the opinion of the court that petitioners have not exhausted state remedies insofar as they contend that there was racial discrimination in the selection of the trial jury.

With respect to the other contention in the instant motion having to do with selection of the foreman of the grand jury, this court entered an order on February 17, 1976 dismissing the contention on the ground that this issue had been adequately investigated by the state trial judge and that his determination that there had been no racial discrimination was correct. Since this court made the determination that this contention should be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, —U.S.—, 49 L.Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact-finding process so far as the conviction is concerned, if petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in state court to be correct, but also it ap-

pears that, since the contention was fairly heard in state court, petitioners are not entitled to another review here. See also: *O'Berry v. Wainright*, —F.2d—, 45 L.W. 2422 (decided Feb. 11, 1977).

Accordingly, the instant motion will be denied.

It is so ORDERED.

ENTER this 23rd day of March, 1977.

/s/ BAILEY BROWN
CHIEF JUDGE

In the United States District Court for the
Western District of Tennessee
Western Division

James E. Mitchell
vs.
Jim Rose, Warden } C-75-222

and

James Nichols, Jr.
vs.
Jim Rose, Warden } C-75-265

CERTIFICATE OF PROBABLE CAUSE AND ORDER ALLOWING APPEAL ON PAUPER'S OATH

(Filed April 1, 1977)

The petitioners having been allowed to proceed originally in this Court *in forma pauperis* and this Court finding no reason to certify that the appeal is not taken in good faith;

On application of the petitioners through counsel, this Court hereby grants the motion to proceed *in forma pauperis* and issues a Certificate of Probable Cause pursuant to Rule 22 (b) of the Rules of Appellate Procedure.

/s/ BAILEY BROWN
CHIEF JUDGE

OPINION

No. 77-1272

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

JAMES E. MITCHELL and JAMES NICHOLS, JR.,
Petitioners-Appellants,
v.
JIM ROSE, WARDEN,
Respondent-Appellee.
} Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed January 9, 1978

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and GRAY, Senior District Judge.*

PECK, Circuit Judge. On November 6, 1972, Petitioners James Mitchell and James Nichols, Jr., were indicted for two counts of first degree murder by the Tipton County, Tennessee grand jury. On March 22, 1973, they were found guilty after a jury trial.

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* Honorable Frank Gray, Jr., United States District Court for the Middle District of Tennessee, sitting by designation.

Prior to the trial, petitioners filed a pro se motion, asking the trial court to dismiss the indictment because the grand jury and the foreman of the grand jury which indicted them had been selected in a racially discriminatory manner. A pretrial hearing was held and the trial judgment, making no written or oral findings of fact or rulings of law, entered an order which stated in full: "Plea in abatement is overruled."

The ruling was upheld in the Tennessee Court of Criminal Appeals on the grounds that racial discrimination had not been proved, and certiorari to the Tennessee Supreme Court was denied. Petitioners then turned to the federal courts for relief, filing pro se petitions for writs of habeas corpus in the United States District Court for the Western District of Tennessee.

The district judge denied an evidentiary hearing, and ruled that

> the question of racial discrimination in the selection of the grand jury was adequately investigated and that the state trial judge, in ruling that no discrimination had been shown in the selection of the grand jury made the correct decision on the record before him.

The district judge went on to hold, however, that a prima facie case had been made with respect to the foreman issue, and ordered the state to make further response.

The state submitted two affidavits. The foreman of the grand jury which indicted the petitioners stated that he had not voted on the indictments, and that petitioners were indicted after the grand jury had heard only one witness. The judge who had appointed the foreman also submitted an affidavit, stating, "We called Mr. Smith [the foreman] because he has been willing to act in the past and has experience and does a good job as such foreman." The trial judge's affidavit continued:

> In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foremen very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so.

On the basis of these affidavits, the district court ordered the dismissal of the petitions for habeas corpus relief, stating:

> [N]o racial discrimination in the composition of the grand jury has been shown. On the contrary, it appears that one black person actually served on the grand jury that indicted these petitioners, that the foreman was selected for other than racial reasons, and that the foreman did not vote at the time the indictment was rendered.

The petitioners have appealed that order, contending that they have made out a prima facie case of discrimination in the selection both of the grand jury and of the foreman, which the State of Tennessee has not adequately rebutted. In the alternative, they argue that they have a right to an evidentiary hearing in the district court to further develop the facts.

I

Tennessee uses the "key man" system of jury selection, relying on three jury commissioners appointed by the trial judge to select a pool of prospective grand jurors from the general population. Tenn. Code. Ann. § 22-223. Every two years, the commissioners meet to select names "from the tax records and permanent

registration records of the county, or other available and reliable sources," § 22-228. The number of names are determined by the judge. The names are recorded officially in a jury list book, § 22-228(a), then written on cards, sealed in a box, and drawn at random as needed for jury service. The same list serves as jury pool for both grand and petit juries.

The commissioners have a duty to propose a "list of names of upright and intelligent persons known for their integrity, fair character and sound judgment." § 22-228. The basic statutory qualifications for jury service are that a juror must be at least eighteen years old, a United States citizen and a resident of the county in which he or she serves as juror. § 22-201. In addition, persons convicted of "infamous offenses," of unsound mind, with deficient sight or hearing, or habitually drunk are disqualified. Persons in certain exempt occupations or who would suffer hardship if they served are excused.

The foreman or forewoman of the grand jury is selected in an entirely different manner. In essence, they are hand-picked by the trial judge from the eligible population for a two-year appointment. § 40-1506. They are subject to the same statutory qualifications as jurors except that they must be at least twenty-five years old.

II

The facts elicited at the pretrial hearing were meager, especially as to hard figures or even substantiated estimates of the racial makeup of Tipton County grand juries. For instance, there is no indication in the record of the total number of persons in the jury pool, nor is there any indication of the racial makeup of the pool. However, some relevant information may be gleaned from the record.

In 1972, the jury commissioners in Tipton County were three men, all white. The November, 1972 grand jury was

selected from the jury pool chosen two years earlier. Names were selected from the local telephone directory,[1] and all three commissioners testified that they selected names only of persons they knew, either personally or by reputation, and that they were aware of their duty to select, without prejudice, black members of the community.

Very few statistics were mentioned at the hearing, although one commissioner testified that he though the county was about 30% black. (The 1970 Census shows that Tipton County was 32.4% black.)[2] Neither the total number of names in the jury pool, nor the number of blacks was established, though it is significant that the state could easily have done so. This would prove beyond a doubt that there was no discrimination, if such were true, since a jury list book is a statutory requirement, and since the commissioners are ac-

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[1] Petitioners have challenged the use of the telephone directory as a source of names for jury service. The use of phone books has been upheld in the past, *Gebhard v. United States*, 422 F.2d 281 (9th Cir. 1970), but petitioners, relying on census data, have made a showing that 44.3 percent of Tipton County black households are without telephone service while only 20.7 percent of white households are without such service. The use of voting lists with such disparities has been upheld, but on the grounds that registering to vote is a voluntary act which is reasonable to require of jurors. We need not decide whether obtaining telephone service is a similar voluntary act, but note that the Supreme Court, reversing a district court's finding of no discrimination, has held that

> the court should not have passed without response the commissioners' elimination from consideration for jury service of about 9% of the population of the entire county. In the face of the commissioners' unfamiliarity with Negroes in the community and the informality of the arrangement by which they sought to remedy the deficiency in their knowledge upon recompiling the jury list, we cannot assume that inquiry would not have led to the discovery of many qualified Negroes.

Turner v. Fouche, 396 U.S. 346, 360 (1970).

[2] The courts may take judicial notice of census figures, absent a showing that they are unreliable for some reason. *Goins v. Allgood*, 391 F.2d 692 (5th Cir. 1968); *cf., Castaneda v. Partida*, 430 U.S. 482, 487-488 (1977).

quainted with everyone on the list. However, three prior foreman did testify in vague terms about the representation of blacks on the juries themselves.

The three of them had served off and on as grand jury foreman since the early 1950's. None of them could recall a black foreman or forewoman. However, each testified that blacks had served on their grand juries, remembering "several," "some," "probably three or four," "usually two or three," and one black woman on the November, 1972 grand jury that indicted the petitioners.[3]

III

The fundamental rules to be applied in cases charging grand jury discrimination are well established. For almost a century it has been settled law that if a state chooses to use grand juries to return indictments, the jurors must be selected without discrimination because of race or color. In 1879, in its landmark trilogy of cases establishing the right of blacks to serve on juries and grand juries, and the right of every accused citizen to an indictment by a grand jury selected without discrimination, the Supreme Court pointed out:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury . . . selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which

[3] The state presented no rebuttal except the testimony of the Circuit Court Clerk, who agreed with the prosecutor's comment that there had been "a very substantial number of members of the Negro race" on petit and grand juries.

> the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Strauder v. West Virginia, 100 U.S. 303, 309 (1879). Substantial underrepresentation, as a result of purposeful discrimination, is as much a constitutional violation as total exclusion. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Turner v. Fouche*, 396 U.S. 346 (1970).

There seems to be a common misconception, exemplified by the trial judge's comments at the evidentiary hearing, the district court's opinion dismissing the petition, and respondent's brief, that constitutional requirements are met if there are simply "some" blacks on grand juries. This is probably due to frequent judicial statements that there is no requirement for any particular jury panel to contain blacks, and that the venire need not contain the names of blacks in the same proportion as they are to be found in the general population. Both these statements are quite true; however, they are true because both may occur without discrimination against blacks. However large a percentage of the jury pool are black, and single jury, randomly drawn, may be all white (or, for that matter, all black). Also, neutral legitimate requirements imposed by the state on its jurors may weigh more heavily on one race than another, resulting in percentages different from those in the general population. Whether the presence of a few blacks on grand juries over the years is evidence tending to prove or disprove racial discrimination depends on the proportions of blacks who are qualified for jury service.

The method of establishing a prima facie case of intentional discrimination is also well-established when, as here, the alleged discrimination is aimed at blacks. If over a significant period of time there exists a substantial disparity between the proportion of blacks in the general population, and the pro-

portion called to serve as grand jurors,[4] and the selection procedure affords an opportunity to discriminate or is not racially neutral,[5] then the defendant has made out a prima facie case, and the burden shifts to the state to rebut the case. *Castaneda, supra,* 430 U.S. 482; *Alexander v. Louisiana,* 405 U.S. 625 (1972).

Once the burden has shifted to the state, it may rebut the prima facie case in several ways. The state may impose any reasonable qualifications it wishes on its grand jurors; for instance, it may require that they be literate, that they not be convicted felons, or that they be registered voters. The neutral imposition of any of these requirements may *possibly* result in the exclusion of more members of one race than another. "There are many possible circumstances which, if they exist here, might account lawfully for the observed disparity. The

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[4] In most reported cases thus far, this statistical analysis has been largely intuitive, based on rough impressions about probabilities. However, given accurate data, the probability that racial results are due to chance can be analyzed mathematically and either affirmed or rebutted with considerable accuracy. For instance, in *Castaneda, supra,* 430 U.S. 482, with a 79.1% Mexican-American population and 39% Mexican-American grand jurors over a period of eleven years, the Supreme Court could determine that the chances of such a result occurring without racial discrimination were less than one in ten to the 140th power, and thus could be described as impossible. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 388 (1966). Statisticians generally reject the possibility that a particular result is due to chance when the probability of that result occurring by chance is less than one in twenty. *Id.* at 359. We need not decide today at what point the courts should similarly reject an assertion that a particular racial result is due to chance rather than discrimination.

[5] While the facial constitutionality of the key-man system has been upheld, it has been frequently recognized as a method particularly subject to abuse, and therefore subject to close scrutiny by the courts. We note, as has the Supreme Court on numerous occasions, that random selection methods similar to the federal system would avoid most of the potential for abuse found in the key man system, and would probably eliminate challenges such as the State of Tennessee faces here. *Castaneda, supra,* 430 U.S. at 497 n. 18.

suggestion of their possible existence is not enough, however." *Stephens v. Cox,* 449 F.2d 657 (4th Cir. 1971). The state must present some concrete evidence of the effect of its neutral requirements, not merely present to the court unfounded suppositions about the literacy, intelligence and good character of its black citizens.[6] Finally, it should be noted that self-serving protestations from the officials involved that racial considerations played no part in the selection are not enough to rebut a prima facie case. *Castaneda, supra,* 430 U.S. at 498 n. 19; *Alexander v. Louisiana, supra,* 405 U.S. at 632.

IV

Applying these principles to the grand jury selection in this case is difficult because of the vague nature of the data available. Accepting as true the testimony of the grand jury foremen at the pretrial hearing, over the last quarter-century there has been at least one grand jury which was less than 8 percent (one in thirteen) and one which was nearly 31 percent black (four in thirteen). These figures do not help us, however, because there is no way to tell from the record what average percentage of all the grand juries over those years was black, the only statistic which would help to prove or disprove the existence of discrimination.

We need neither depend on questionable estimates nor remand for a time-consuming hearing,[7] however, because there is no guesswork about the figures in the second aspect of petitioners' case. There has never been a black foreman or fore-

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[6] *See Turner v. Fouche,* 396 U.S. 346 (1970), in which the Supreme Court rejected the state's attempt to explain the disparity in black representation on juries by arguing, without substantiation, that many blacks were not "upright" or "intelligent" enough to serve.

[7] In *Townsend v. Sain,* 372 U.S. 293 (1963), the Supreme Court held that an evidentiary hearing must be held on an application for federal habeas corpus relief "unless the state-court trier of facts has after a full hearing reliably found the relevant facts." *Id.* at 313.

woman of a grand jury in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen. The statutory qualifications are identical to those of jurors except that foremen or forewomen must be a few years older. The position is filled by the trial judge from the general population, thus affording ample opportunity for discrimination, whether conscious or unconscious. While discrimination must be "intended," officials who select grand jurors must be considered to have intended the natural results which flow from their conduct. *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). Thus a judge who "never really gave any thought" to appointing a black is discriminating just as surely as were the jury commissioners who never selected blacks because their names were "never discussed." *Norris v. Alabama*, 294 U.S. 587 (1935), or because they didn't know any blacks, *Turner v. Fouche*, 396 U.S. 346 (1970). Officials who select grand jurors have a duty to learn who is qualified to fill the position of grand juror, and to consider qualified individuals from all segments of society. Failure to perform that duty, resulting in the exclusion of a qualified segment of society, is unconstitutional discrimination. *Turner, supra*, 396 U.S. 346.

Thus the petitioners clearly established a prima facie case of racial discrimination in the appointment of grand jury foremen and forewomen. The state presented no rebuttal to this case at the hearing, but in response to the district court's request for a further answer to this prima facie case, submitted the two affidavits described above. In dismissing the petitions, the district judge stated that the foreman was "selected for other than racial reasons, and . . . did not vote at the time the indictment was rendered." Thus we must decide whether, as the district court ruled, the state has successfully rebutted the prima facie case.

Perhaps understandably, it appears that the district court has given undue weight to the exculpatory affidavit of the trial

judge. In *Alexander v. Louisiana, supra*, 405 U.S. 625, the Supreme Court pointed out that

> the clerk of the court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. App. 34. The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *Turner v. Fouche, supra*, at 361; *Jones v. Georgia*, 389 U.S. 404, 407 (1967). "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez v. Texas*, 347 U.S., at 482. . . . The commissioners, in any event, had a duty "not to pursue a course of conduct in the administration of their office, which would operate to discriminate in the selection of jurors on racial grounds." *Hill v. Texas*, 316 U.S. 400, 404 (1942).

An absence of blacks qualified to serve as foremen or forewomen has not been demonstrated or even suggested; thus there has been no rebuttal of petitioners' prima facie case.

The fact that the foreman did not vote on petitioners' indictments also fails to support the district court's dismissal. Consideration of this factor is closly linked to the final, implicit question in this appeal: whether proof of discrimination in the selection of a grand jury foreman mandates the same remedy as does proof of discrimination in the selection of the grand jury. Normally, if the state fails to successfully rebut a prima facie case of discrimination, a writ of habeas corpus must issue, since the indictment and all proceedings on that indictment are void. *See Castaneda*, 430 U.S. 482. There is no need for the petitioner to show prejudice, and a showing of no prejudice by the state is no defense. *Hill v. Texas*, 316 U.S. 400 (1942).

The question is whether the same result is required when there is discrimination shown only in the selection of the grand jury foreman. While the parties did not brief this issue, it is necessary that we consider it since the district court apparently relied on a finding of no prejudice, pointing out that the foreman rendered no vote on the indictment.

In 1973, this Court held on facts similar to those here that no discrimination had been proved because the particular foreman in question had not been appointed in the usual fashion, but selected in an emergency from among the grand jurors. There was no challenge to the makeup of the grand jury panel. Thus the defendant could not rely on proof of past absence of blacks from the foreman position, along with a selection process susceptible to abuse, because the foreman in this case had not been selected in the same manner. *Hale v. Henderson*, 485 F.2d 266 (6th Cir. 1973), *cert. denied*, 415 U.S. 930 (1974). Not inconsistent with that opinion, we hold today that where a prima facie case of discrimination in the selection of grand jury foreman has been established, and has not been rebutted, "the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained." *Hill v. Texas*, supra, 316 U.S. at 406.

The foreman or forewoman is vitally important to the functioning of grand juries in Tennessee, being "the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof." Tenn. Code Ann. § 40-1506. He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments,[8] and like every other

[8] *See* Tenn. Code Ann.,

§ 40-1510. Duties of foremen or forewomen.—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoenas for witnesses to go before the grand jury, unless otherwise ordered by the district attorney.

§ 40-1622. Power of foreman to administer oath.—The foreman of the grand jury shall have power to administer oaths to all witnesses brought before the grand jury to testify as to the violations of the criminal laws in all cases where the clerks of the criminal and circuit courts may administer said oath.

§ 40-1706. Concurrence in true bill.—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill" and the indorsement signed by the foreman.

§ 40-1709. Presentation of indictment.—An indictment, when found by the grand jury, and indorsed as prescribed by this chapter, shall be presented by the foreman, in their presence, to the court, and filed by the clerk.

chairperson is in a position to guide, whether properly or improperly, the decision making process of the body. Additionally, the indorsement and signature of the foreman or forewoman is indispensible to an indictment in Tennessee, and their absence voids the bill. *Bird v. State*, 103 Tenn. 343, 52 S.W. 1076 (1876).

In any case, even without these important duties and powers, the foreman or forewoman is a full member of the grand jury, and we agree with the district court in *Hale v. Henderson*, 336 F.Supp. 512 (W.D. Tenn. 1972), that a grand jury which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments.

It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could

be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

However, it is not simply the possibility of prejudice to a criminal defendant that mandates the reversal of convictions based on unconstittutional indictments. In fact, it is quite clear that a constitutional indictment may be returned by an all-white or an all-black grand jury, and the possibility of prejudice is no less if such a jury makeup occurred by chance rather than by design. Even a white defendant has standing to challenge a grand jury selection process which systematically excludes blacks. *Peters v. Kiff*, 407 U.S. 493 (1972). Many years ago it was recognized that the injury is more subtle, and runs deeper than direct racial prejudice against the defendant:

> [R]eversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

Ballard v. United States, 329 U.S. 187, 195 (1946).

In *Peters v. Kiff, supra*, 407 U.S. 493, the state opposed the issuance of the writ to a white prisoner, arguing that

> even if the grand and petit juries were uncontitutionally selected, petitioner is not entitled to relief on that account because he has not shown how he was harmed by the error. It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.

Id. at 498. The Supreme Court expressly rejected this argument, holding that such discrimination by its very existence denies a defendant due process of law:

> [A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

The necessary remedy in such a case is also clear:

> [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. . . . [I]t is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained.

Hill v. Texas, 316 U.S. 400, 406 (1942).

It is therefore ordered that the cause be remanded to the district court for entry of an order providing that petitioners' convictions be set aside, and that within sixty days the petitioners be reindicted failing which the writ of habeas corpus shall be made absolute and petitioners released from custody.

In the United States Court of Appeals
for the Sixth Circuit

James E. Mitchell and James Nichols, Jr.,
Petitioners-Appellants,
vs.
Jim Rose, Warden,
Respondent-Appellee.
No. 77-1272.

PETITION TO REHEAR ON BEHALF OF RESPONDENT-APPELLEE

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Statement of the Case

This action is before this Court pursuant to an appeal from the ruling of the United States District Court for the Western District of Tennessee which denied the Petitioners-Appellants' applications for the writ of habeas corpus. On January 9, 1978 this Court rendered a memorandum decision reversing the District Court and remanding this cause to the District Court for entry of an order setting aside the petitioners' convictions and requiring the State to either reindict the petitioners or release them from custody within sixty days. The respondent-appellee here now files this petition for rehearing, respectfully requesting this Court to rehear and reconsider the decision previously filed.

Primarily, the respondent-appellee seeks rehearing on the basis of the law as set out in the recent United States Supreme Court decision of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The *Stone* decision first appears in this record in an order entered by the District Judge on March 23, 1977 (Appendix 38A). That order was entered in response to a motion for hearing which was filed after the District Judge had decided the case by memorandum and order on February 17, 1977. (Appendix 35A). Actually, the case had been decided at the district level before the citation to *Stone v. Powell* ever appeared in the second order of March 23rd. Since the case was decided originally and primarily on other grounds, the issue of *Stone's* application was not thoroughly presented to this Court, and is not discussed in the Court's decision. The respondent-appellee now respectfully prays for rehearing and reconsideration of that decision in view of the law as set out in the *Stone* decision.

Synopsis of the Facts

The relevant facts are known to this Court and appear in the briefs, lower court decisions, and the decision of this Court. The respondent-appellee will not hear further elaborate or detail of those facts, but will simply offer a brief synopsis for the convenience of the Court:

The petitioners were indicted on November 6, 1972 for two counts of first degree murder by the Tipton County, Tennessee grand jury. That grand jury was composed of twelve individuals and one foreman. One of the individuals was a black woman. The regular foreman of the grand jury was ill at the time and the trial judge picked a former foreman who served in the absence of the regular foreman. This grand jury unanimously voted to indict the petitioners after hearing one police officer testify. The testimony of this officer primarily consisted of the petitioners' confessions, which he had already obtained. The

grand jury foreman did not vote on the indictment but did sign the indictment, as is required by Tennessee law. The grand jurors themselves, when indicting, did not know the race of the petitioners. On March 22, 1973 both petitioners were found guilty after a jury trial.

Prior to trial the petitioners filed a plea in abatement asking for dismissal of the indictment because the grand jury and the foreman of the grand jury had been selected in a racially discriminatory manner. The plea was overruled by the trial judge. The convictions were affirmed by the Tennessee Court of Criminal Appeals and certiorari was denied by the Tennessee Supreme Court. The United States District Court for the Western District of Tennessee dismissed the petitioners' application for the writ of habeas corpus. This Court reversed that decision, finding racial discrimination in the appointment of grand jury foremen in Tipton County. This Court further found that federal habeas corpus relief must be granted the petitioners without any proof of prejudice resulting from the exclusion of blacks from the post of grand jury foreman.

The Issue

I

ASSUMING THE SYSTEMATIC EXCLUSION OF BLACKS FROM THE POST OF GRAND JURY FOREMAN, MAY A STATE PRISONER BE GRANTED FEDERAL HABEAS CORPUS RELIEF ON THAT BASIS ALONE, AFTER BEING CONVICTED AT A TRIAL WHICH IS WITHOUT CONSTITUTIONAL DEFECT, AND AFTER HAVING AN OPPORTUNITY FOR A FULL AND FAIR LITIGATION OF THE CLAIM IN STATE COURTS, IN LIGHT OF THE UNITED STATES SUPREME COURT DECISION IN STONE V. POWELL, 428 U.S. 465, 96 S.Ct. 3037 (1976)?

Brief

In the landmark decision of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976), the United States Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a State prisoner be granted Federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

The proposition here put forth is that the doctrine of *Stone* extends beyond cases involving Fourth Amendment claims and encompasses a case, such as the one sub judice, where a constitutional infirmity occurs during the accusatory stage of the criminal process and has been mooted by the subsequent trial and conviction. This very extension of the doctrine and philosophy of *Stone* was expressly recognized by the District Court in the instant case. In the post-decision order of March 23, 1977, Chief Judge Brown stated:

> "Since this court made the determination that this contention be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, — U.S. —, 49 L.Ed.2d 1067 (1976).
>
> "As we read that decision, where the claim of constitutional error does not go to the integrity of the fact finding process so far as the conviction is concerned, if the petitioner received a full and fair hearing in State court as to his claim, the Federal court will not review the determination by the State court. Thus, not only have we found the decision in the State court to be correct, but also it appears that, since the contention was fairly heard in State court petitioners are not entitled to another review here." (See Appendix 39A).

In *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272 (1977), Mr. Justice Powell, in dissent, specifically recognized that "a

strong case may be made that claims of grand jury discrimination are not cognizable on Federal habeas corpus after *Stone v. Powell* . . .". In fact, Mr. Justice Powell's dissent, joined by two other members of the Court, recognizes in *Castaneda* that the rationale of *Stone* is better applied to a case involving a tainted indictment than a case involving the admission of tainted evidence. As explained by Mr. Justice Powell:

> "Unlike the prisoner in *Stone*, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in *Stone*, the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as outweighed by the acknowledged cost to other values vital to a rational system of criminal justice. See *Castaneda* at 1287, at Footnote 1."

The issue of extending the rationale of *Stone* was not before the Supreme Court in *Castaneda*. The issue had not been addressed in the lower courts and was not briefed or argued in the Supreme Court. However, the fact that three members of the Court still discussed the issue, without resolution, indicates that *Stone* is not a case which is to be confined to its facts. The petitioners-appellants' brief mistakenly indicates otherwise. On page 48, the appellants contend that the fact *Castaneda* was decided after *Stone* represents an affirmative decision by the Court not to extend *Stone* to grand jury discrimination cases. A closer reading of *Castaneda*, as discussed immediately above, indicates otherwise.

In the instant case this Court has granted the appellants the writ of habeas corpus and set aside their conviction for murder. This action has been taken after finding that the non-voting

grand jury foreman was selected in a discriminatory manner. This action was taken without any showing or prejudice by the appellants. This action was taken even though the integrity of the trial is not impugned. The constitutional error found by this Court occurred during the accusatory stage of the criminal proceedings against them and undoubtedly had no effect on their subsequent convictions. However, as stated in the opinion of this Court, the remedy ordered was not only directed at injury to the defendants. The injury sought to be remedied is the injury to the system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts. See *Ballard v. United States*, 329 U.S. 187, 185 (1946).

In short, this Court has not determined that Tennessee is incarcerating two innocent individuals. Rather, this Court has determined that the procedure utilized by the State is constitutionally defective. The convictions are set aside because the Constitution prohibits the procedure by which they were obtained. *Hill v. Texas*, 316 U.S. 400, 406 (1942). Ever since the earliest decisions involving systematic exclusion, the relief granted when discrimination is found, has been to quash the indictment and set aside the conviction without regard for any showing of actual prejudice and without a weighing of harmlessness. See *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct 536, 83 LEd. 757 (1939); *Witus v. State of Georgia*, 385 U.S. 545, 87 S.Ct. 643 (1967). The rationale has consistently been that a conviction, no matter how overwhelming, cannot withstand a pretrial procedural constitutional error, no matter how miniscule. The thought is that the integrity of the system suffers, whether the prisoner does, or not. Therefore, the form of relief, reindictment and retrial or release, is at least partially granted to preserve the integrity of the system. This philosophy does not much differ from the deterrent purpose which has long supported the grant of Federal habeas corpus relief to State prisoners as-

serting Fourth Amendment claims. The State respectfully submits that the propriety of granting relief of this nature in cases such as the one sub judice, must be re-examined in view of the Supreme Court's decision in *Stone*, and the dissenting opinion in *Castaneda*.

Interest in promoting judicial integrity has never prevented the use of illegally seized evidence in grand jury proceedings. *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Furthermore, the law is settled that after a criminal defendant pleads guilty, he is not entitled to raise, in a Federal habeas corpus proceeding, independent claims relating to the deprivation of constitutional rights that antedated his plea, such as constitutional infirmities in the grand jury selection process. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In other words, a state prisoner has no recourse through Federal habeas corpus if he subsequently pleads guilty after being indicted by a grand jury which purposefully and systematically excludes members of his race, and also bases the indictment upon the consideration and viewing of illegally seized evidence. Yet, according to this Court's decision, two individuals subsequently convicted by a jury are allowed Federal habeas corpus relief because the non-voting foreman of their grand jury has been found to be selected in a discriminatory manner. This is true even though the members of the grand jury heard only one witness and did not know the race of the petitioners-appellants. The State respectfully suggests that the only rational purpose served by this result, when the integrity of the fact finding-process, or trial, is unquestioned, is the promotion of the system or judicial integrity. Under the mandate of *Stone* this purpose must be weighed against the substantial societal cost of applying such relief.

In *Tollett* the United States Supreme Court held that the entry of a guilty plea represents a break in the chain of events which has preceded it in the criminal process. See *Tollett v.*

Henderson, 93 S.Ct. at p. 1608. From that point on, a criminal defendant may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. The State respectfully suggests that the same type of break occurred in the instant case on March 22, 1973, when a trial jury in Tipton County, Tennessee, found the petitioners-appellants guilty of murder. As suggested by Mr. Justice Powell in *Castaneda*, the grand jury determination that there was sufficient cause to proceed to trial was moot, since a trial jury has found guilt beyond a reasonable doubt. The State respectfully submits that from that point on, according to the authority of *Stone* and the dissent in *Castaneda*, the petitioners-appellants were foreclosed from seeking Federal habeas corpus relief on grounds attacking the composition of the grand jury, unless a showing is made that the defendants were not afforded a full and fair opportunity in State court. The District Court here found the petitioners-appellants were afforded this full and fair opportunity. Therefore, the petitioners-appellants are only entitled to seek Federal habeas corpus relief on the basis of constitutional claims attacking the fact-finding process which convicted them.

Finally, the respondent-appellees wish to be sure that this Court, in reaching its decision, has considered the concept of harmless error. In reading the Court's decision, the respondent has interpreted the last three pages to mean that harmless error is not a proper consideration in cases of this nature. This conclusion stems from the Court's discussion on the necessity of showing prejudice in a case of this nature. The Court has found that a showing of prejudice is unnecessary. The respondent has concluded, therefore, that the Court has considered and rejected the concept of harmless error. In any event, if the interpretation of the Court's opinion is incorrect, the respondent wishes to submit for rehearing and reconsideration the issue of harmless error. The respondent considers this issue to be a separate principle from those espoused in *Stone*. The respondent believes that this

Court could find the constitutional error harmless under the standards set out in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Conclusion

For all the above stated reasons, the respondent-appellee respectfully prays that this Honorable Court will grant this petition to rehear and reconsider the decision of this Court filed on January 9, 1978. The ends sought by respondent-appellee are affirmance of the District Court dismissal of the petitions for the writ of habeas corpus and a reinstatement of the convictions of the petitioners.

Respectfully submitted,

/s/ MICHAEL E. TERRY
MICHAEL E. TERRY
Assistant Attorney General

Certificate of Service

I hereby certify that copy of the foregoing petition to rehear has this day been forwarded, by first class postage paid mail, to the Honorable Walter C. Kurtz, Attorney for Petitioners-Appellants, University of Tennessee Legal Clinic, 1505 West Cumberland Avenue, Knoxville, Tennessee 37916, this 25 day of January, 1978.

No. 77-1272

United States Court of Appeals
For the Sixth Circuit

James E. Mitchell and James Nichols, Jr.,
Petitioners-Appellants,
v.
Jim Rose, Warden,
Respondent-Appellee.

ORDER
(Filed March 30, 1978)

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and GRAY, Senior District Judge.

Upon consideration of the petition for rehearing filed herein by respondent-appellee, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
John P. Herman, Clerk of Court